

No. 16231 ✓

VOL. 3100

United States
Court of Appeals
for the Ninth Circuit

NATIVIDAD SALINAS, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

Transcript of Record

In Two Volumes

VOLUME II.

(Pages 305, to 633, inclusive)

Appeal from the District Court for the District of Alaska,
Second Division

FILED

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(Testimony of Edward J. Harkabus.)

(The jury inspects G-5 and G-6 after which they are returned to the Clerk and placed with the rest of Exhibit G. The jury is then duly admonished by the Court and the case is recessed and court adjourned at approximately five o'clock p.m. until ten o'clock a.m. the following morning.)

Be It Remembered that at 10:00 a.m. on April 24, 1958, court reconvened and the trial of this cause was resumed. The defendant was personally present and represented by counsel; the plaintiff was represented by the United States Attorney.

The Court: It appears that all the jury are present.

(Both counsel stipulate as to the presence of the jury.)

The Court: We will proceed then with the examination of the witness, Mr. Harkabus, who was on the stand at the time of adjournment last evening.

Q. (By Mr. Hermann): Would you please state what all of the factors were on which you based your opinion as to the point of origin of the fire?

A. Well, as I previously testified, the point of origin was determined, based on discovery of the soldering iron casing, various rings we had here yesterday, and sawdust sample which was discovered at the point of origin which had the greatest depth of char. Generally in a point of origin its a point of it which burns the longest length of time and you have more char there. Directly above the

(Testimony of Edward J. Harkabus.)

point of origin the roof eaves were completely destroyed, [265] which further indicated this was the point of origin of the fire.

Q. Now in regard to the sawdust sample which you explained yesterday, would you state whether or not you examined any other sawdust in the attic and, if so, where?

A. I did. I sampled sawdust throughout the attic area where the fire had occurred.

Q. What, if anything, did you discover from that examination?

A. I discovered the absence of any odor like the sample I took, which had the odor of gasoline.

Q. Mr. Harkabus, I hand you plaintiff's Exhibit J and ask you if you have ever seen it before?

A. Do you mind if I open this jar?

Q. Go ahead.

(The witness opens the jar.)

A. Yes, sir, I have seen it.

Q. Where did you first see it?

A. I saw it in the attic of the Kotzebue Grill adjacent to the point of origin of the fire.

Q. How can you determine that is the same object you saw at that time.

A. My initials are on this jar, and when this was picked up it was placed in the jar and so labeled with my initials and also initialed by the U. S. Marshal, Robert Oliver.

Q. Is there anything about the paper itself that recalls to your mind?

A. Well there is a substance on here which ap-

(Testimony of Edward J. Harkabus.)

pears to be pancake makeup to me. [266]

Q. Would you state where or not you have seen any similar substance in the Kotzebue Grill?

A. Well, not a substance in that effect. However, there was pancake makeup on the dresser in Mr. Salinas room in the Kotzebue Grill.

Q. Was the makeup in there in any way similar to the makeup on the paper?

A. Yes. It appeared to be similar.

Q. Were there any other pieces of paper in the attic?

A. Well, there were pieces of charred paper.

Q. Will you describe them.

A. Well, they were just merely charred paper, small pieces of charred paper.

Q. Are you acquainted with the defendant?

A. No, I am not.

Q. To your knowledge does any member of the National Board of Underwriters hold any insurance on the premises known as the Kotzebue Grill?

A. No, sir.

Q. Mr. Harkabus, did you formulate any opinion as to the amount in dollars of the damage the Grill had received as a result of the fire?

Mr. Taylor: Just a minute, your Honor, I am going to object to the question on the grounds this witness has not been qualified as a builder or real estate expert sufficiently to estimate damage to the building.

The Court: He testified to his experience as an appraiser sufficiently to qualify him. He may answer. [266]

(Testimony of Edward J. Harkabus.)

A. Well, I would estimate damage to the Kotzebue Grill to be in the neighborhood of \$2,000.00 to \$2,500.00.

Q. (By Mr. Hermann): At the time you inspected the upstairs of the Kotzebue Grill, did you notice stock? A. I did.

Q. What kind of stock did you notice?

A. In the back room there were several cases of canned goods, two of which were on the floor and are indicated by the photographs, and against the left wall I believe there were eight or nine cases, I believe. There could have been more but that is my recollection, and in a small pantryway or store-room there were condiments and spices. I didn't inventory or check for volume.

Q. Were there any other foodstuffs, besides those which you have mentioned, in the upstairs of the Kotzebue Grill?

A. Not to my knowledge and recollection, no, sir.

Q. Did you formulate any estimate as to the market value of the Kotzebue Grill following your inspection? A. You said market value?

Mr. Taylor: Just a minute, your Honor, I am going to object on the grounds the market value would not be the true value of the place.

The Court: Well that is correct. Perhaps it is preliminary. As I understand it, the true value for insurance purposes must be the market value less depreciation. Is that correct?

A. Yes, sir. [267]

(Testimony of Edward J. Harkabus.)

The Court: So it is probably preliminary. But in order to show the market value less depreciation, first the market value must be shown.

Mr. Taylor: The reason I brought that up, your Honor, unless there is a buyer able and willing to buy and a seller who wishes to sell and desires to sell, the market value would be what was agreed upon. But I doubt whether there would be enough sales such as that in Kotzebue to establish a market value. I think your best value would be the replacement value.

The Court: Possibly your last question is right. The market value, I understand, for insurance purposes means replacement value. That is, the market value at the time of loss would be the replacement.

Mr. Hermann: That is not my understanding. I think the market value is the value the builder might be expected to sell for.

The Court: Perhaps we had better ask the witness here for sure whether it is the replacement cost or market value in the ordinary sense.

A. There are several ways of figuring it in relation to depreciated value or, as Mr. Taylor pointed out, it can be the market value. However, to save everyone's time here, I don't feel qualified to give an estimate of the market value on the place. I don't know how much the transportation costs to Kotzebue would be and the other factors involved.

Q. (By Mr. Hermann): What does market value generally mean for insurance purposes? [268]

(Testimony of Edward J. Harkabus.)

A. Well, sir, the market value would be whatever the selling price would be. If, for example, an individual purchased a property—we will take an arbitrary figure, say, of \$10,000.00, he certainly wouldn't have, if he had made no improvements, he wouldn't have a greater equity than his \$10,000.00.

Q. Then we would figure depreciation on the price of the building?

A. Say, for example, he could sell for \$20,000.00—but for insurance purposes it can be figured in many different ways. I am not being evasive, sir.

The Court: The market value then, is only one factor in determining replacement cost?

A. If, for example, you had several contractors to bid on it, what each of them thought in their own minds, that would be the replacement cost of the value of building.

The Court: You do not feel qualified to——

A. I make an estimate, sir, but the adjuster is the one to handle those factors.

Q. (By Mr. Hermann): Would you state generally in what type of condition you found the building as a whole at the time you made your investigation.

A. Well, the building appeared to be an old type structure and wasn't in too good condition. And I base that on the fact that the upstairs floors were cracking, on the roof joists, and the wiring was in poor shape. In fact we found pennies behind the fuses on the wiring circuits. Some of the

(Testimony of Edward J. Harkabus.)

plywood was off and it was a patchwork type of thing. I don't know how old the structure is actually, but generally I would say off-hand it was in poor condition. [269]

Mr. Hermann: I have no further questions.

Cross Examination

Q. (By Mr. Taylor): Mr. Harkabus, of the various persons that you were employed by, and especially the Association of Fire Underwriters—was that the name?

A. National Board of Fire Underwriters.

Q. National Board of Fire Underwriters, and you say that consists of 144——

A. Capital stock insurance companies, yes, sir.

Q. Your salary is paid by the National Board, is it? A. That's right.

Q. Has your training in this particular line, that you mentioned in your direct examination, has that been within the years in which you have been with the National Board? A. Yes, sir, partially.

Q. Also, I believe you said you had investigated the origin of approximately 600 fires?

A. I said several hundred—I didn't say 600.

Q. That would include many small fires in which the origin was very evident, would it not?

A. As well as many large ones, yes, sir.

Q. Then you investigate the origin of all fires, regardless of whether there is any suspicion of their being incendiary or not?

A. Well maybe I can answer this way: if I

(Testimony of Edward J. Harkabus.)

receive a request to investigate by any official agency to investigate to determine the cause, whether there are any suspicious circumstances or not, I will, yes—and whether there [270] is any insurance or not.

Q. I believe the purpose of that, Mr. Harkabus, is to have you make an examination for the benefit of the Underwriters, so if there have been any practices in that particular building causing that particular fire, it would be brought to the attention of the Board so they can promulgate rules and regulations to eliminate the possibility of fire by that source. It might be a careless practice and they would like to eliminate it.

A. That is partially true; and another factor is the elimination and suppression of arson in relation to the same matters. But you are partially right, yes.

Q. In the last four years how many arson cases have you actually been interested in, Mr. Harkabus?

A. Well, I am interested in all arson cases, Mr. Taylor.

Q. Well, that you participated in prosecuting?

A. I will have to think for a moment here. You mean the ones that went to trial—is that your point?

Q. Yes.

A. Oh, I would say, roughly, six.

Q. That is throughout the Territory of Alaska?

A. Yes, sir.

Q. Now a few questions—I believe you answered them fairly off-hand. You mentioned in regard to

(Testimony of Edward J. Harkabus.)

this soldering iron about a flash point being 495 degrees. What did you mean by that? That gasoline has that flash point?

A. No, sir. Gasoline has a flash point of minus 45 degrees.

Q. 45 degrees? [271]

A. Yes, sir. But it has an ignition temperature of 495 degrees—

Q. If it reaches 495 degrees—is that fahrenheit or centigrade? A. Fahrenheit.

Q. Also you stated that a soldering iron, such as would result if these parts fitted together and were the same soldering iron, would reach a heat between nine hundred and eighteen hundred degrees? A. Yes, sir.

Q. Fahrenheit?

A. Fahrenheit. They are capable of reaching that. Naturally the lower limit would be from zero up through that range.

Q. As I understand, Mr. Harkabus, the base or part going to make the point will be much heavier if you are doing a commercial job of soldering, such as pipe than if you do a smaller job. In a smaller job you would use a smaller point as the smaller point doesn't take as much electricity and keeps the point down to a heat just slightly more than the soldering element that you are using?

A. Would you repeat that question, please?

Q. Maybe I can illustrate it a little better than that. I believe you said that tin has a melting point or fusing point of 1100 degrees?

(Testimony of Edward J. Harkabus.)

A. That is tin as of itself, Mr. Taylor, not in combination with lead, as in solder.

Q. And lead you said has 66 degrees as a melting or fusing point? A. Yes.

Q. Then, if you had a solder, if you were using tin—if you were using a solder and doing some work, and you were using tin for solder, which [272] they do, wouldn't you have to heat your point slightly more than 1100 degrees? Very little more than 1100 degrees?

A. Well, if you had one specific type of soldering iron for each element you attempted to solder, you would have a mitt full of soldering irons.

Q. I know that. But the smaller the iron the less heat it will give out—it won't hold the heat as good?

A. Well I would say generally that would be true, yes.

Q. So then I believe the usual soldering compound is a mixture of tin and lead, is it not?

A. Yes.

Q. Do you know what the melting or fusing heat is for an ordinary soldering mixture?

A. Not off-hand, no, sir.

Q. Could it be five hundred and some degrees?

A. It could be.

Q. So you would want your soldering iron to be slightly more than that?

A. It would be dependent on the percentage of tin vs. the percentage of lead in the mixture you have there. I mean the melting point of lead itself

(Testimony of Edward J. Harkabus.)

is 660 and with a combination of tin it would undoubtedly be higher than 500.

Q. Then some elements—would you tell us, if you know, if there could result a combination of elements at which the fusing point might be lower?

A. It's possible.

Q. Now I don't believe you testified, did you, Mr. Harkabus, as to how long it would take if that soldering iron were put in the sawdust, that [273] it would take to ignite the sawdust to cause the fire such as occurred in the Kotzebue Grill?

A. No, I don't believe I testified as to that.

Q. You made no test as to that?

A. No, sir.

Mr. Taylor: Now may I see those pictures, please. The last bunch that was put in—the large ones.

Q. Now Mr. Harkabus, I hand you plaintiff's Exhibit 4, G-4, and ask you to point out on that exhibit, if it is on there, the point of origin of the fire.

A. G-4. In the upper left-hand corner you can see a portion of the trapdoor, but it doesn't give a wide enough angle here to point it out specifically. It would be on this edge, right approximately in here, sir (indicating).

Q. Maybe we can do better with one of these other exhibits. Mr. Harkabus, I will hand you then Exhibit G-7 and ask you if that would be better for illustrating the point of origin?

A. G-7. The point of origin is almost directly

(Testimony of Edward J. Harkabus.)

in front of this mysterious hand pointing out of the loft structure here, almost directly below that adjacent to the roof joists, the ceiling joists.

Q. Thank you. That would be practically under this hand. This is a trap door then, that is an opening into the attic?

A. That is the opening into the attic, yes.

Q. Now let's clear up—first let's clear up this mystery. Who does the mysterious hand belong to?

A. Deputy Marshal Adirim. [274]

Q. I thought I recognized it. Now, having the exhibit in mind, Mr. Harkabus, how can you reconcile your statement and the fact that all those other papers were consumed in the attic and that this paper was found intact in the attic and shows no sign of charring, no sign of burning or no sign of having been in contact with the fire whatever?

A. I wouldn't say it shows no sign of contact.

Q. Did you use a magnifying glass?

A. I don't need it, Mr. Taylor. If you will bear with me—this is the point of origin here—(indicating); the paper was found just a little bit to the left of it. You are asking for an opinion now, aren't you?

Q. I am asking how you reconcile the fact of the extent of damage and saying that this was found near the point of origin of the fire, which you say was the hottest part of the fire; and you say this shows no charring and no appreciable change from the condition it was in when put up there?

(Testimony of Edward J. Harkabus.)

A. Well, sir, it could have been under sawdust, because the char pattern in this area, with the exception of the point of origin, was not charred to the depth of the plywood ceiling. So if this paper had been under the sawdust or completely covered by it, the fire would have traveled over the sawdust portion and this would not have fire damage.

Q. Now isn't it the intent of your testimony, Mr. Harkabus, to show that that particular exhibit was taken from a room on the second floor of the Kotzebue Grill at or before the time of the fire?

A. The intent of my testimony, Mr. Taylor, is to tell the truth.

Q. Do you believe that that was in the attic at the time of the fire?

A. I believe it could have been, yes, sir. [275]

Q. Can you explain to the jury why it would not have been in the fire or close to a fire such as existed in that attic?

A. I think I have answered that.

Q. You say somebody buried it——

A. I know what I found there.

Q. ——That would be a little far-fetched conclusion, wouldn't it?

A. Not in my mind, Mr. Taylor, because the sawdust at the lower level was not charred at all, as evidenced by this pile over here which shows no char at all (indicating).

Q. Where was the papers that you found up there that was charred? Where did you find those?

A. This paper here, if you take the hand. This

(Testimony of Edward J. Harkabus.)

is Exhibit G-7. That is the point at which this paper was found over here (indicating), further away from the point of origin than the point where the charred paper was found. The actual point of origin would, in my opinion, be approximately five inches in diameter and four inches deep.

Q. The char pattern?

A. Not the char pattern, the char itself, sir.

Q. That is the sawdust would be about that?

A. Yes, sir.

Q. Now this could have been taken up there the night of the fire, after the fire was put out, couldn't it?

A. It could have been.

Q. Somebody could have grabbed a piece of this paper toweling for wiping their hands? [276]

A. It's a paper towel.

Q. Mr. Harkabus, are you familiar with the type of generation of electric heat by induction?

A. Yes, sir.

Q. Will you explain to the jury as briefly as possible how heat by induction is brought about.

A. Well, it is comparable to a coil, and I think most people are familiar with what a coil is. Are you talking about heat in relationship to wiring? The relationship of heat in wiring—

Q. Yes.

A. The three major causes of electric fires, one being arcing, and another would be dead shorts, where you have the generation of heat where resistance is built up in an electric circuit to the point where it acts as a coil and causes heat. It's also very common in BX wiring.

(Testimony of Edward J. Harkabus.)

Q. Would that be where there is two wires in BX, might it have one system that would go into a BX and if there was a reason for this electricity continuing to flow against it, would it get that wire inside hot if the electricity was only flowing in one wire?

A. Well, if two wires were shorted, or you had a dead short anywhere along the line, it would generate heat because the circuit is broken and it is heating up the BX cable as well as the electric wire.

Q. The wire inside gets hot first, does it?

A. Yes, sir.

Q. If it got hot enough it will burn the insulation?
A. It will. [277]

Q. Then the BX?

A. Not necessarily. At that point it might move back to your power source.

Q. Might there be someplace on the BX where it might build up a heat sufficient to cause a fire?

A. Yes, sir.

Q. Now isn't it evident on this exhibit Number—
I am not familiar with this system—

Clerk of Court: L.

Q. —Does not this Exhibit L—examine that, please, and see if any place on it that shows where it has been subjected to considerable heat?

A. It has been subjected to heat; there is no question about that.

Q. And calling your attention, Mr. Harkabus,

(Testimony of Edward J. Harkabus.)

to one particular point here, does not that indicate the insulation inside has boiled out through that BX, been subjected to greater heat at that point than others?

A. I wouldn't say that, sir, no. This heat here as evidenced on this BX could be caused from the fire itself; I mean, are you indicating this is caused from a short circuit? I am trying to answer your question honestly.

Q. I am not indicating anything; I am trying to get at the truth.

A. This doesn't indicate to me a greater degree of heat than anywhere along the circuit on this BX, no. If there was an arcing there would be.

Q. That is what I say: could there possibly be an arcing at that particular point?

A. We can take it apart and find out.

Q. Does not that show there has been some substance that has melted [278] or evidently come there from an exterior source?

A. It's possible.

Q. Mr. Harkabus, did you take the samples of the sawdust? A. Yes, sir.

Q. Was that on the 30th day of December, 1957?

A. Yes, sir, it was.

Q. In your training as an FBI agent and also your training for your present work for the National Association of Underwriters, have you had occasion to ascertain the odors of various inflammable liquids, whether they will cling to sawdust or other fabrics or any other substances?

(Testimony of Edward J. Harkabus.) .

A. That is a pretty wide question. Do you mean all the range of volatile liquids?

Q. Gas, blazo, kerozene, I think, which are possibly the three most used.

A. Well, let me answer this way, Mr. Taylor: The evaporation of any liquid volatile would be dependent on temperature factors beyond that point at which natural vapors are given off. That temperature would depend on the condition of the weather, humidity and other factors, so I am afraid I couldn't answer your question.

Q. Well let me ask you just one question in regard to sawdust. In regard to the sawdust, how long would it be in an attic subjected to an intense degree of heat by reason of a fire which lasted for perhaps one hour?

A. I'm afraid I don't understand. What was the question, sir? What was the question?

Q. I asked you how long, do you know how long it would take for the evaporation of that gasoline, kerosene or blazo that might be used in causing [279] that fire?

A. In liquid volatiles, generally they sink to the lowest point at whatever place they have saturated, and many times you will find that flammable liquids, which are liquids below 200 degrees fahrenheit, with a flash point below 200 degrees fahrenheit, some of them will evaporate more rapidly than others, like ether, for example, as against paint thinner. And in many instances even though sawdust or wood has been subjected to intense degrees

(Testimony of Edward J. Harkabus.)

of heat, it is possible to check the lowest point, which would be your point of origin, generally, and find remnants of the volatile that had been used. Does that answer your question, sir?

Q. You answered one point, except there is one point I wanted to get. How long would that remnant remain in that sawdust? So that it could be detectable by a sense of smell?

A. Well, I can't answer that question as to how long it would remain, but sawdust, if it is utilized as an insulation barrier also burns over a wide area like, for example, a catalog will. If you note books involved in fires, they are compressed, and the sawdust in this instance had water thrown on top of it, and the area where we found the sawdust which emitted an odor similar to gasoline, had about a half inch of water adhering to it. I mean the sawdust was frozen together.

Q. How long after the fire had that frozen?

A. Well, sir, the fire occurred on the 25th; I found the sample on the 30th day of December.

Q. And you think, then, that smell of that gasoline then, or blazo or kerosene or ether would have lingered in that sawdust during that time? [280]

A. I do.

Q. Now would you smell this, Mr. Harkabus, and I will ask you if you can detect at this time the smell of gasoline, kerosene or blazo or ether?

A. Well, I smelled it yesterday and detected an odor of gasoline at that time. As I testified, when we placed the sample in that jar, that was four months ago.

(Testimony of Edward J. Harkabus.)

Q. And you have had that in a sealed jar with a rubber seal, have you not? A. Yes, sir.

Q. Now after smelling that this morning, Mr. Harkabus, is that not more the smell of crude oil than gasoline? A. Not in my opinion, no.

Q. Now, Mr. Harkabus, you have indicated quite a knowledge of electronics, not electronics, but electric systems, and I am going to ask you if you will examine that cord and tell me if that cord would be suitable for a connection from a plug to a soldering iron.

The Court: The exhibit number, counsel?

Q. Exhibit H.

A. You say from a plug—do you mean an outlet?

Q. That you would plug into the line?

A. With this small end of the plug?

Q. Yes.

A. I would say it would be.

Q. You think it would be heavy enough to carry a load to heat a soldering iron? [281]

A. Yes, sir.

Q. Now, Mr. Harkabus, I believe to be effective, that is as an instrument for starting a fire, this item Number I and this E would necessarily have to be merged together into one instrument, would they not?

A. Well, let me put it to you this way: you have a heating element, a coil, and it wouldn't necessarily have to be merged into one instrument to generate heat, but if you were using it for soldering it would.

(Testimony of Edward J. Harkabus.)

Q. It would not be a very effective instrument if they were not both together.

A. Let me see the one element, please.

(One of the exhibits is handed to the witness.)

A. This connection here, Mr. Taylor, (indicating), if it were hooked up to here (indicating), should generate heat. The grooves give transmitted heat to the point of your soldering here (indicating). It is transmitted through this coil, which is all this amounts to, to the point of your soldering.

Q. But to get that soldering iron to send out this 900 to 1800 degrees we have here, it would necessarily have to be in here?

A. If you wanted to utilize it as a soldering iron, yes.

Q. You did not see them assembled at any time?

A. I never did, no.

Q. Now, Mr. Harkabus, would you examine both of these and state in your opinion, whether either one of those has been through a fire?

The Court: That is Exhibit E and Exhibit I you are talking about? [282]

Mr. Taylor: Yes, sir.

A. This definitely has. This is Exhibit I. Because the wires indicate a high degree of heat on the brass section, and the wires are melted off and it is soldered on to the little screws here (indicating).

Q. Well, if there was a high degree of heat on that isn't it a fact that solder would melt?

(Testimony of Edward J. Harkabus.)

A. Well, the end of the wire is gone from there.

Q. These are the ends, are they not?

A. This is a small piece of wire adhering to the screw, if you will notice.

Q. But the solder has not melted then?

A. Well, it could have melted and rehardened. I don't know. I don't know that, sir.

Q. Well, isn't it a fact that when a thing laying there gets hot enough, solder will run away from the point in which it has melted, by the gravity itself of the solder, which is high? You have a high gravity.

A. Gravity is the same throughout the earth.

Q. Well, you have a specific gravity of solder which is much greater, much heavier, than the specific gravity of water or air?

A. I don't believe you could say it would run away; if it were melted in a flat position on a horizontal basis and doused with water it would re-harden, in the same place.

Q. Well, heat reduces solder to a liquid, does it not? And liquid seeks its own level, does it not?

A. Yes. [283]

Q. Very doubtful whether that solder would remain on those set screws, would it?

A. It's a matter of conjecture, Mr. Taylor.

Q. It would be conjecture, yes. In the ordinary use of a soldering iron, where it was used, it would show some signs of heat around these connections just the same as this shows some signs of heat?

A. Probably.

(Testimony of Edward J. Harkabus.)

Q. I am just going to ask you one or two more questions, Mr. Harkabus, and that is the appraisal of property for the purpose of insurance—when an insurance agent insures property he insures on its present value, does he not?

A. Well, sir, I am not an insurance agent; I am an arson investigator. The only appraisals I make are in relationship to the amount of damage to the premises.

Q. In your work though, do you have occasion to talk with the insurance people who actually write the insurance? A. Yes, sir.

Q. As to how they arrive at the evaluation of certain property?

A. Well, you can arrive at it from many stand-points; one is the depreciated value, which would be the purchase price less depreciation; another would be the fair market value; and another would be the replacement cost.

Q. Now if a person went to an insurance agent and asked him to examine—Well, perhaps the best way to illustrate the question is to say I bought a piece of property with a building, and that the building upon it was worth \$20,000.00. I bought it for \$10,000.00 but there would be nothing wrong for me to insure that for \$20,000.00, would there, if the actual value was \$20,000.00. [284]

A. If the actual value was \$20,000.00 there would be nothing wrong.

Q. Did you look any place other than the Kotzebue Grill in regard to restaurant stock that was on hand?

(Testimony of Edward J. Harkabus.)

A. I did not, no. I didn't know there was any other stock.

Q. That's all, Mr. Harkabus.

Redirect Examination

Q. (By Mr. Hermann): Mr. Harkabus, I hand you plaintiff's Exhibit E and Exhibit I and ask you, if you know, what would keep the element inside the case of the soldering iron, normally?

A. Normally there would be a wood handle. Otherwise you would get a shock every time you used it, or your hand would get heated up by grabbing the metallic portion of the soldering iron.

Q. Now calling your attention to the casing, Exhibit E, to some discoloration on it, do you have any explanation as to what would cause such a discoloration?

A. Well, I would say it probably was involved in a fire. However, there are instances when you do get a discoloration on a piece of Chrome metal when it is used in the normal course of soldering, but it would usually be down in the lower section. This could be caused from a possible short in the iron but this appears to me to have been in a fire, I think. I don't actually know, but I know the element has been.

Q. Could you tell us whether or not it would be likely for the iron to short if the handle and cord were burned? A. Yes sir.

Q. What would be the normal color of a new iron of that nature? [285]

(Testimony of Edward J. Harkabus.)

A. It should be rather shiny because it has a chrome finish on it.

Q. Could you state whether or not a substance of crude oil would eventually evaporate?

A. Over a period of time it probably would, but the same answer I gave Mr. Taylor—crude oil would not be as volatile as gasoline or ether or other flammable liquids.

Q. But eventually would it evaporate?

A. Well, it probably would, but I mean it would depend on factors of humidity, temperature and other factors, so it would be impossible to answer that. The sawdust that we found—well, I have answered your question.

Q. Was there any indication of what element was first to catch on fire in that attic, that you noticed?

A. Well, I will have to go back to my reference point, which is the point of origin, and the fire initiated in that area and traveled upward until it hit the eaves, and rolled around the roof.

Q. Let me put it this way: in relationship to the sawdust and wood was there any indication of what article was the first to catch on fire in that attic?

A. That would be very difficult to say because the ignition temperature of paper, sawdust and wood are very close and I couldn't say in what order the fire did occur actually. Probably paper would kick off before the rest of it and gasoline would kick off before paper.

(Testimony of Edward J. Harkabus.)

Recross Examination

Q. (By Mr. Taylor): Just two questions and I think I can finish. Mr. Harkabus, do you know what the ignition point of dry sawdust is? [286]

A. The ignition point of sawdust is 450 degrees.

Q. Now this sawdust in the bottle is not burned sawdust is it? Just charred?

A. Well, it is burned on the surface. As I testified, sawdust has a tendency to burn like a large catalog if it is packed down.

Q. Well, the entire mass doesn't catch fire, does it?

A. It would generally be over the surface of it, unless it has a low point.

Q. Well, would it be a charring more than anything else?

A. Well, the top of it will be charred yes, if that answers your question.

Q. Now Mr. Hermann was asking you about crude oil such as fuel oil. Isn't it a fact Mr. Harkabus that crude oil contains certain tars that if they get on to something those tars are deposited although the oil itself might go away, and those tars will remain there and have an odor for many, many years?

A. Well, I don't know, Mr. Taylor.

Q. Are you familiar with the tar pits in La Brea in Los Angeles?

A. I have heard and read of them, yes.

Q. Have you been out there? A. No.

Q. You don't know that the odor of that oil that

(Testimony of Edward J. Harkabus.)

deposits those tars there is still on those deposits?

A. No sir.

(There were no further questions and the witness was excused from the stand.) [287]

Mr. Taylor: May we have a recess at this time, your Honor.

(Thereupon at approximately 11:00 a.m. court was recessed for ten minutes, the jury being first duly admonished by the Court.)

After Recess

(Both counsel stipulated as to the presence of the jury, and all other necessary persons being again present, court reconvened and the trial of this cause was resumed.)

CHARLIE WILSON

was then called as the next witness for the plaintiff, and after being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Hermann): Would you please tell the Court and jury your full name, Mr. Wilson?

A. Charlie B. Wilson.

Q. Where do you live, Mr. Wilson?

A. Kotzebue.

Q. How long have you lived in Kotzebue?

A. Well, since I remember.

Q. How were you employed in December of 1957?

A. How I were employed?

Q. What kind of job did you have?

(Testimony of Charlie Wilson.)

A. I was working for Steve about the first part of December.

Q. Starting in the first part of December?

A. Yes. [288]

Q. How long did you work for him?

A. Well about—I don't know. About two weeks I guess, maybe less. I don't quite remember.

Q. What kind of a job did you have? What kind of work? A. Mostly cleaning up.

Q. Were you at the Grill on the night of December 25? A. After the fire I was there.

Q. What time did you get there about?

A. After the fire.

Q. Was the fire out when you arrived?

A. Yes.

Q. Were people fighting the fire?

A. Yes, they were.

Q. What was the first thing you saw when you got there? A. When I first got there?

Q. Yes.

A. Before I went in I see flames going out of the room.

Q. What did you do after that?

A. I was going upstairs, but I don't go clear upstairs, to go back downstairs.

Q. What did you do after you went back downstairs? A. I was watching the cash register.

Q. Do you recall whether or not you saw Joe Brantley at the fire? A. Yes.

Q. Where did you first see him? [289]

A. Halfway from the place to the restaurant.

(Testimony of Charlie Wilson.)

Q. Where did he go from there, that you saw?

A. Well, we went down to the Grill together.

Q. What did he do when you got to the Grill?

A. He opened the outside door.

Q. Which door would that be?

A. Toward Fergusons. The side door.

Q. Is that on the bottom floor or the second floor?

A. The bottom floor.

Q. What does that door open into? What part of the Grill?

A. The kitchen.

Q. Did you go in with him?

A. Yes.

Q. What did he do in the kitchen?

A. He got the key for the upstairs and opened the upstairs.

Q. What did you do at that time?

A. While they were putting the fire out I was downstairs all the time.

Q. While you were downstairs?

A. Well, I was watching the cash register.

Q. Would you state whether or not you were asked to watch the cash register?

A. Yes.

Q. Who asked you to?

A. Steve.

Q. What did he say when he asked you to? [290]

A. He just wanted me to watch the cash register. That's all.

Q. Where did you meet Steve at?

A. Right by the steps I met him.

Q. Do you recall exactly what he said to you?

A. That's all he said to me. I just met him there. A lot of boys were around and he said he wanted me to watch the cash register.

(Testimony of Charlie Wilson.)

Q. I see. How long did you stay down there with the cash register?

A. Well, until the fire was out.

Q. Now do you know whether or not there was any blazo in the Grill before the fire?

A. Yes. There was one upstairs.

Q. Whereabouts upstairs?

A. In the back room.

Q. Do you know who put it there?

A. I put it there, myself.

Q. Would you explain how you happened to put it there.

A. Well, I brought it down from Rotmans and I bring it upstairs.

Q. What do you mean you brought it from Rotmans? From the store or hotel or where?

A. From the hotel.

Q. Whereabouts in the hotel? A. Room 7.

Q. Whose room was room 7 in the hotel?

A. I think it was Steve's room.

Q. How did you happen to go to Room 7? [291]

A. He told me where to get it and told me where the Blazo was and told me to bring it down to this room.

Q. Did he tell you to put it in the room, the back room upstairs? A. Yes, upstairs.

Q. When was it he told you to get the Blazo and put it up there?

A. That was the day before the fire because I was using gas all the time myself.

Q. Do you know how much gas was in the can just before the fire.

(Testimony of Charlie Wilson.)

A. A little more than half, I guess, the last time I used it.

Q. What was that Blazo usually used for?

A. Blow torch. I used it for the blow torch all the time.

Q. When was the last time you used that can?

A. I used it every day. I used it on the 24th.

Q. When was the last day you used it before the fire?

A. Before the fire?

Q. Yes. A. The 26th.

Q. Is that when it was over half full at that time?

A. Yes.

Q. Now before you put the can in that room, where was the Blazo generally kept before then?

A. Well I usually put it right in the corner, on the right side, on this side (indicating).

Q. Before you put it in the room was any Blazo kept anywhere else?

A. Oh yes. There was one Blazo can—the Blazo was kept where they [292] kept the ice in the back shed downstairs.

Q. How many times during the fire did you see Mr. Salinas?

A. During the fire?

Q. Yes.

A. Well, I seen him about two or three times downstairs.

Q. Would you describe how he acted when you saw him?

A. He was all right. I mean he didn't—

Q. Was there any indication that he was excited?

(Testimony of Charlie Wilson.)

Mr. Crane: Objected to, your Honor, as being leading and suggestive and putting the answer in the witness' mouth. This witness is intelligent and can answer those questions.

The Court: Well, it is somewhat leading, but an effort to draw out the witness on a particular inquiry, along a particular line, and is explanatory. I do not think the objection applies, so he may answer.

A. What was the question again?

(The reporter then reads the previous question as follows: "Q. Was there any indication that he was excited?")

A. No. He wasn't excited.

Q. (By Mr. Hermann): Now during the time you were employed by the Kotzebue Grill did you ever clean up the upstairs of the Grill?

A. I cleaned it up every night.

Q. What was the front room of the upstairs used for? [293]

A. Well, paper work, and sometimes the girls ironed there. They do cleaning there like washing clothes and everything.

Q. What room or rooms were next to that front room as you go back?

A. What rooms were next to that front room?

Q. Yes.

A. There was a room, different room or something next to it on the right side.

Q. Have you been in that room? A. Yes.

Q. How was it furnished?

(Testimony of Charlie Wilson.)

A. Well, there is beds, a stand,—well, I don't quite remember what was in there. But there was beds, about one bed I think.

Q. Do you recall whether or not there was any clothing in that room?

A. Well, there was—I don't know whose clothes were in it—but hanging in there, there was clothes in there.

Q. What kind of clothes?

A. Men's clothes.

Q. Were they dress clothes, work clothes or what kind of clothes?

A. Dress clothes and work, something like that.

Q. Whose room was that?

A. I don't know whose room that was. Nobody was staying there.

Q. Across from that room what kind of room was there? A. Across from this same room?

Q. Across the hall. A. Steve's room. [294]

Q. How was that room furnished?

A. It's got a big bed, drawers. Two drawers on each, both sides, a mirror and a little closet.

Q. Have you seen the inside of the closet?

A. Well, it's open, no door to it. The shoes are there.

Q. Pardon? A. His shoes are kept there.

Q. Anything else kept there?

A. I don't think so.

Q. Any clothing there? A. No.

Q. Were any other things in that room?

A. There was three drawers.

(Testimony of Charlie Wilson.)

Q. Three drawers?

A. Yes. Two right alongside, and one right by his bed.

Q. Have you ever seen Mr. Salinas in that room?

A. Often, yes.

Q. What would he use the room for?

A. Sometimes he stays there. Sometimes while I am working he would be in there laying down or something.

Cross Examination

Q. (By Mr. Crane): Charlie, what were your usual working hours there for Steve? I mean about what time of evening would you go to work and what time would you leave?

A. Well I come there about seven and I get out between, sometimes I [295] get out at 9:30, when I get out early. Sometimes I get out at 11:00.

Q. In other words, what you would do would be to come in about the closing time of the restaurant and then you would take over and clean up?

A. One hour ahead of time.

Q. Charlie, when you left then, would you usually be the last one to leave the restaurant?

A. Yes.

Q. And you would lock the place up as you left?

A. Yes.

Q. All right. You were employed there all during December?

A. Well, not all during December. It was about two weeks I guess.

Q. Well, whatever it was.

A. Yes.

(Testimony of Charlie Wilson.)

Q. While you were employed there was anybody sleeping there anywhere upstairs at night?

A. No. I don't think anybody was sleeping there.

Q. Then none of the rooms were occupied upstairs? A. Well——

Q. Charlie, you spoke about paper work in the front room. You mean the front room facing Kotzebue Sound where they used it as an office?

A. Yes.

Q. If you know, who did the paper work in there? Who did Steve's paper work in there?

A. Percy Ipalook.

Q. Would he at times be working in there when you were there?

A. He would be working sometimes. [296]

Q. Percy Ipalook would come down there and work nights in the front office? A. Yes.

Q. Did he have any particular time to come or any time to leave as far as you know?

A. Well, as soon as he quits working for the school he goes down there and works.

Q. Would Percy sometimes lock up the place after he left the upstairs or would you always lock it up. A. I always locked up.

Q. In other words, you would wait until after Percy was through? A. Yes.

Q. Now this back room, Charlie, where the fire occurred, that room was used as a general store-room, was it not?

A. Yes. Right in front of it—I mean between——

(Testimony of Charlie Wilson.)

Q. Where did you keep your blow torch? Upstairs in that room? A. No. Downstairs.

Q. But you stored your Blazo up in the storage room? A. Yes.

Q. Was some canned goods and stuff stored there too? A. Yes.

Q. And was there some sacks of dry groceries, commodities like beans, sugar and stuff like that up there?

A. No. I didn't see anything like that up there.

Q. Not in the back room. Was there a bunch of canned goods in the front room? [297]

A. Yes.

Q. Where else around the building was stuff stored? In the back warehouse?

A. In the front room and back room, and there is a little place between about so wide (indicating) with some dry goods. There were food shelves.

Q. There was a bunch of food stored downstairs too, wasn't there? A. Yes.

Q. Now, Charlie, coming back to the night of the fire; Steve told you to watch the cash register. That was while he was helping them fight the fire?

A. Yes.

Q. Steve was helping put out the fire?

A. Yes.

Q. Now I will ask you this: I will ask you first a preliminary question. Did you observe more or less intoxicated people around there that night?

A. Yes, there were.

Q. Now isn't it a fact that you had a good deal

(Testimony of Charlie Wilson.)

of trouble in fighting the fire because of drunks running in and out of the building getting in the way?

A. There was a couple I think. They come and go and come and go like that. They weren't doing much; they weren't fighting much.

Q. Was there anybody there to take charge and keep order at that time?

A. Except the boys that were fighting the fire.

Q. Just the boys that were there? A. Yes.

Q. I think you said something—I don't know whether you mentioned it or not—did you mention something about Charlie Norton—I don't know [298] whether you did or not.

The Court: No, he did not.

Q. (By Mr. Crane): Do you know when Charlie Norton left Kotzebue? About when?

A. Well, I think—I don't know about Charlie Norton, but I heard he was at Anchorage.

Q. Well, I will put it this way: Charlie Norton had left before you started to work for Steve, is that correct? A. Yes.

Q. Then all the time you worked for Steve Salinas, nobody occupied the upstairs? A. No.

Q. I will ask you one question: did I understand you to say that upstairs in the storeroom is where you usually kept the Blazo for your blow torch?

A. What do you mean by that?

Q. You used this blow torch all the time. Was this back storeroom upstairs the usual place to keep the supply of Blazo for the blow torch, was it?

(Testimony of Charlie Wilson.)

A. Yes.

Q. That's all.

Redirect Examination

Q. (By Mr. Hermann): During the fire did you at any time go upstairs in the Grill?

A. During the fire?

Q. Yes. A. Yes. [299]

Q. You went upstairs?

A. Yes. I went upstairs about two or three times while they were fighting the fire.

Q. Did you fight the fire yourself?

A. No, I didn't. I didn't do a thing. I was downstairs all the time while they were fighting the fire.

Q. You were downstairs all the time?

A. Yes.

(There were no further questions and the witness was excused from the stand.)

NANNIE COLSON

is called and sworn as the next witness for the plaintiff, and after being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Hermann): Would you please tell the Court and jury your full name, Mrs. Colson.

A. Nannie Howarth Colson.

Q. Your last name now is Colson, is that right?

A. Colson.

Q. Nannie Howarth Colson? A. Yes.

Q. Are you over 21 years of age? A. Yes.

Q. Where do you live?

A. I am staying over at Fred's now. [300]

(Testimony of Nannie Colson.)

Q. Where do you ordinarily live?

A. Kotzebue.

Q. Do you have a job at Kotzebue?

A. Yes.

Q. What is your job?

A. I work in the restaurant.

Q. Which restaurant? A. Fergusons.

Q. Where is Ferguson's Restaurant in relation to the Kotzebue Grill? A. Right next door.

Q. Were you working there on December 25?

A. Yes.

Q. How long did you stay working there that night?

A. Oh, I worked late. I come about 11:00 in the morning and get off eight at night.

Q. Pardon?

A. I come on about 11:00 in the morning and get off at 8:00.

Q. Were you working the evening of December 25? A. Yes.

Q. When did you quit work that night?

A. I don't know. After they got done with the fire.

Q. What was the first you knew of the fire?

A. Well, I was mopping the floor and somebody came in and said there was a fire.

Q. Do you recall who it was? [301]

A. No. Everybody was all out.

Q. Pardon.

A. Everybody was all out of Archie's. I was the last one to leave there.

(Testimony of Nannie Colson.)

Q. By Archie you mean Archie Ferguson?

A. Yes.

Q. Is he the owner of Ferguson's restaurant?

A. Yes. He is in Seattle right now.

Q. What did you do after that, after you heard about the fire?

A. Well, I just put my mopstick down and ran out and go on the side of the building.

Q. What did you do?

A. I asked somebody if they seen Steve, and I went over to the hotel.

Q. Do you know what time it was when you went over to the hotel? A. No.

Q. What did you do when you got to the hotel?

A. I opened the door and said "Steve, your place is on fire."

Q. Where was Steve when you did this?

A. I ran upstairs and stood by the door and said "Your place is on fire." He was standing by the hallway.

Q. How far down the hallway?

A. Near the door where it says "private."

Q. Pardon?

A. Near the door where it says "private."

Q. Where it says "private"?

A. Yes. [302]

Q. How far is that from the head of the stairs, about? A. Quite a ways down.

Q. What is in between there?

A. They have rooms all the way down that way.

Q. What was Steve doing there?

(Testimony of Nannie Colson.)

A. He was—I saw him standing down there.

Q. What was he doing standing there?

A. He had his coat on and, I don't know, his gloves in his hand, I guess.

Q. Do you recall what else he was wearing?

A. No. He had a dark brown jacket on.

Q. Do you recall what he had on his feet?

A. That I can't say much.

Q. What did he do when you told him the place was on fire?

A. He went down the hall, and I told him to hurry up.

Q. Did he hurry up?

A. He walked down, and then I ran downstairs and opened the door.

Q. What did you do then?

A. After we got out, there was Bunny Rotman and Howard Monroe and then they went down.

Q. Did you go down to the fire then yourself?

A. I went down, and then I went back to work.

Q. Were you with Steve when he went to the fire?

A. No. I was walking back with Bunny.

Q. Could you see Steve on his way to the fire?

A. Yes. We saw him going down. [303]

Q. Was he running?

A. They run and then they would walk.

Q. Did Steve say anything up in the hotel when you told him the place was on fire?

A. I don't know. I don't remember.

(Testimony of Nannie Colson.)

Q. Now this place which says "private" on it in the hotel, have you ever been in that place?

A. On down at the other end.

Q. Is this Rotman's Hotel that we are talking about?

A. Yes. I have been in the kitchen and living room.

Q. What kind of a place is that?

A. A nice place.

Q. Is it an apartment or what?

A. They have a living room and kitchen—that's all I have seen of it.

Q. Now do you know whether or not there were any lights on in the living room?

A. As I was coming towards the fire I saw a room—I don't remember which one it is—but there was a light on in one of the rooms further on on this side (indicating).

Q. Was it in the living room?

A. No, one of the rooms I guess people rent.

Q. Were any other lights on? A. No.

Q. Did you see anyone else in the hotel when you went to get Steve? A. No. [304]

Q. Now, have you ever worked for Mr. Salinas?

A. Yes, I have.

Q. What kind of work did you do for him?

A. I used to work downstairs in the afternoon, and in the afternoon I worked upstairs and cleaned up his rooms and do laundry and ironing for him.

Q. Where was his room?

(Testimony of Nannie Colson.)

A. From the big room it's on this side of the place (indicating).

Q. What kind of work would you do in cleaning that room?

A. Mopping the floor and making the bed and sometimes straighten his drawers out.

Q. What months was it you worked for him?

A. It was in about November and part of December.

Q. Do you recall whether or not you ever made the bed in December? A. Yes.

Q. Did you ever make Mr. Salinas' bed there?

A. Yes sir. You see I worked in the morning and once in a while I go up in the morning and then I go to work at Archie's.

Q. How was this room furnished?

A. It's got a bed, got a closet and two drawers.

Q. Do you know whether or not there was anything in the closet in December? A. No.

Q. Do you know whether or not there was before then? A. Just his clothes.

Q. That's what I mean. What was in there?

A. Let's see — he had shirts and suits — dress pants and shoes.

Q. Do you know whether they were in that room in December?

A. Yes. He had some of them there.

Q. You stated you did washing and ironing?

A. Yes.

Q. Did that include Mr. Salinas' personal laundry? A. Yes.

(Testimony of Nannie Colson.)

Q. What would you do with his shirts and things like that?

A. After I wash them, I starch them and iron them, and then hang them in the closet. Sometimes I leave them in the front room.

Q. Now were there any other living rooms in that place?

A. No. They just have that one big room that's all.

Q. What was across the hall from Mr. Salinas' room?

A. Oh. That used to be Charlie's room, across the hall.

Q. Where is Charlie? Do you know where he is?

A. He is in the hospital.

Q. Do you know when he went to the hospital?

A. I don't remember.

Q. Well, when was the last time you were in that room?

A. Charlie's room?

Q. Yes.

A. I don't remember when I was in there last.

Q. Do you know whether or not you were in there in December?

A. Yes. It was before Christmas. I think me and Esther was looking for decorations. [306]

Q. What did you see in that room?

A. There was just a bed in there and a drawer.

Q. Were there any clothes in there?

A. Some of Charlie's clothes I think.

Q. Were there any other things in the room?

A. No. I don't remember.

(Testimony of Nannie Colson.)

Q. Before I forget it, you say you worked part of December. You knew, did you not, that Steve planned on a vacation at the end of the month?

A. Yes. He told me he was going on vacation some time after Christmas.

Q. That was general knowledge around there?

A. Yes.

Q. Now, Nannie, coming to this room, you said you sometimes used the back room for ironing?

A. Yes.

Q. Now when I say the back room I mean the room that later the fire occurred in. Were there any plug-in sockets in that room to put in an iron and electric appliances?

A. There is one in the corner that we used to put a plug in. We have to screw it in.

Q. Were there any other plug-ins there?

A. No, no other plug-ins.

Q. Any other sockets?

A. There are four of them, which you can take the bulb out and use.

Q. Was they all in working order?

A. There is one, I have trouble in it once in awhile.

Q. Is there one short-circuited?

A. Yes, the one on this corner. [309]

Mr. Crane: I wonder if I can see those pictures.

Q. Nannie, I will hand you defendant's Exhibit 2, which is a picture of a part of the interior of the room and ask you if you can recognize where the socket, whether this socket shown in the picture is

(Testimony of Nannie Colson.)

the one that was shorted or whether it was some other place in the room? You can just point out the shorted socket. You might just say if there is one here that might give us a better idea.

A. It's that one by the stove, in that corner, on this side (indicating).

Q. How far from the place then, from the opening going into the top?

A. It would be on that side (indicating).

Q. Just point so the jury can see, so the jury can see.

(The witness points to a place on the exhibit.)

Mr. Crane: That is defendant's Exhibit 2.

Q. The last time that you used the back room for ironing or utilities or anything like that, there was live current there? There was electricity in the room so you could get juice? A. Yes.

Q. I will hand you plaintiff's Exhibit F, which is a drawing of a floor plan of the building used for the purpose of illustration, and I will ask you to take the back room where the fire was, if you will, and indicate on that exhibit the position of the defective switch or defective wire or socket, about what part of the room?

A. You mean the one I told you that had a short in it?

Q. Yes. You may mark it by a pencil mark.

A. The one over here.

(The witness marks the exhibit.)

The Court: What type of mark did she use?

(Testimony of Nannie Colson.)

Mr. Crane: She just made a small X. May I just show this to the jury.

The Court: Yes.

(The jury examines the exhibit.)

Q. (By Mr. Crane): Now where did you keep the iron? A. The steam iron?

Q. It was a steam iron was it? A. Yes.

Q. That is, you mean by that an electric steam iron? A. Yes.

Q. Did it have a cord on it?

A. Yes. The steam iron.

Q. I am going to hand you Exhibit H, I will ask you by chance if you recognize that cord or have ever seen it before, if you know?

A. It looks something like a steam iron cord, but I don't know.

Q. You don't know? A. No.

Q. Does it look like the cord to the steam iron that was up there? A. Yes, the one I used.

Q. That's all, Nannie.

Redirect Examination [311]

Q. (By Mr. Hermann): Do you recall whether or not the steam iron cord had any tape wrapped around it? A. On the steam iron?

Q. On the cord? A. No.

(There were no further questions and the witness was excused from the stand.)

The Court: Well it appears hardly advisable to call another witness. It's about time for noon recess so we will recess the case until 2:00 o'clock.

(Thereupon the Court duly admonished the jury, and the regular noon recess was taken.)

After Recess

(At 2:00 p.m. Court reconvened and the trial of the cause was resumed. Both counsel stipulated to the presence of the jury and all necessary persons were again present.)

TOMMY GOODWIN

was then called as the next witness for the plaintiff and after being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Hermann): Would you please tell the Court and jury your full name?

A. Tommy Goodwin.

Q. Where do you live, Mr. Goodwin?

A. Kotzebue. [312]

Q. How long have you lived at Kotzebue?

A. I was born and raised there.

Q. Do you know the defendant, Steve Salinas?

A. Yes.

Q. How long have you known him?

A. Since he came to Kotzebue.

Q. How long was that about?

A. Two-three years.

Q. Do you recall whether or not you saw him on the 25th of December, 1957?

A. I seen him every day.

Q. Do you recall him—whether you saw him on that day, Christmas day? A. Yes.

Q. What time was it the first time you saw him?

(Testimony of Tommy Goodwin.)

A. It was between three and five, anyway sometime around there.

Q. Where did you see him?

A. I don't know—at Harold Little's for a few minutes.

Q. Who was in Harold Little's at the time you saw him there?

A. A whole bunch of us was there. Me and Gene Starkweather was talking to ourselves. We didn't pay much attention to anybody else.

Q. Who, if anyone, was Mr. Salinas talking to?

A. I don't know.

Q. Do you know how long he stayed there?

A. No.

Q. Do you know what time it was about that he left there?

A. We stayed there quite awhile and then went up to Coffee Dan's and I stayed there all the time.

Q. Was Mr. Salinas at Starkweather's house when you left? A. No.

Q. Do you know what time he left the house?

A. I couldn't tell you that.

Q. How long had you been at Little's house when Mr. Salinas arrived?

A. When I went there about 3:30, something like that.

Q. How long were you there before Mr. Salinas came in? A. I was there when he came.

Q. How long had you been there when he came in? A. Oh, I would say a couple of hours.

Mr. Crane: I am going to object to this as im-

(Testimony of Tommy Goodwin.)

material and not connected with the issues in this case. I reserved my objection here thinking he would connect it up, but I cannot see where a visit to Harold Little's house on this date is material.

The Court: It is obviously preliminary. I presume the District Attorney intends to connect it up. The objection must be sustained at this time.

Q. (By Mr. Hermann): How long were you in Mr. Little's house at the time Mr. Salinas came in the house?

A. I couldn't tell you exactly what time it was, but I got to Harold Little's place say about 3:00 or 3:30, something like that.

The Court: I beg your pardon. I just caught myself in an error. I mean that the objection is overruled at this time. You may proceed. [314]

Q. (By Mr. Hermann): Then how much longer did you stay? A. Did I stay?

Q. Yes. At Little's.

A. Oh, I stayed there until we got ready to go up and get coffee at Dan's. I don't know how long—it was pretty late anyway.

Q. How long did you stay at Coffee Dan's?

A. We were there, just sat down and were drinking coffee when somebody hollared "fire".

Q. When you say "we", who do you mean was there besides yourself?

A. Me and Gene Starkweather went in together and had some coffee there. There were quite a few other people in there—I couldn't tell you their names.

(Testimony of Tommy Goodwin.)

Q. What did you do when you heard them hollar "fire"?

A. Well, we started running for the fire.

Q. Would you state whether or not anyone was at the fire when you arrived?

A. Quite a few people were there already.

Q. Do you know whether or not there was anybody upstairs in the building? At that time?

A. When I got upstairs there was quite a few boys there already.

Q. Did Mr. Starkweather go with you to the fire? A. Yes.

Q. Now about how long after you saw Salinas was the fire?

A. Well I couldn't tell you exactly how many hours. [315]

Mr. Crane: I didn't get that answer.

A. I said I couldn't tell him how many hours there were.

Q. (By Mr. Hermann): What did you do after you arrived at the fire.

A. Well, the first thing I did I tried to get the water brigade going.

Q. Where did that brigade lead to and from?

A. It started from Ferguson's store, up the stairway there.

Q. Did you see Joe Brantley at all at the fire?

A. Yes.

Q. Where did you see him?

A. I saw him when I looked in there. They were just getting him through the attic hole there.

(Testimony of Tommy Goodwin.)

Q. Now where was he at the time you arrived, if you know. A. He was already there.

Q. Whereabouts in the building?

A. Where I saw him was upstairs.

Q. Now, have you seen—did you see Mr. Salinas in the next few days after the fire?

A. Yes. The next day.

Q. Where did you see him on that occasion?

A. Down at Harold Little's. I generally go there every day.

Q. Did you talk to him at that time?

A. Yes.

Q. Would you state briefly what was discussed?

A. Well, we was talking—what we had between us—he wanted me to rewire the place where it had burned up. [316]

Q. Did he say when he wanted you to do this?

A. No. He told me to go ahead and do it any time I was ready.

Q. Did you do anything in this respect?

A. No. I just got all the material ready and they already stopped me from doing anything before I got started.

Q. I see. Was there any particular reason why you didn't go ahead?

A. Well, it was right after the holidays and I didn't feel very good. I was celebrating through the holidays and didn't feel like working.

Q. Where was Mr. Salinas at that time?

A. What do you mean by that?

(Testimony of Tommy Goodwin.)

Q. Do you know whether he was still in Kotzebue or not at that time?

A. No. He told me to go ahead and do it any time, so I wasn't—I just got all the material together, and never got around to it.

Q. Now in respect to this wire that you got together, who, if anybody, paid you for that wire?

A. What did you say?

Mr. Crane: If your Honor please, I object to that. It's immaterial and not connected with the issues of this case.

The Court: I fail to see the materiality of it, counsel. Can you suggest what materiality there can possibly be?

Mr. Hermann: Well, the fact of the defendant's leaving. It would bear, in my opinion, on whether he would have stayed to see the place rewired or not.

The Court: That has already been established, about his leaving. Inferences which you wish to draw from the facts may be [317] proper, but I cannot see where this particular fact would be material. Nor can I see now where you have connected up this meeting at Little's in the afternoon, to which objection was made. Is there any connection between that meeting and the case here on trial?

Mr. Hermann: Just to show his whereabouts, the whereabouts of the defendant, on the day of the fire.

(Testimony of Tommy Goodwin.)

The Court: Well that may possibly be material, but this last surely is not.

Mr. Hermann: Very well.

Q. (By Mr. Hermann): Mr. Goodwin, while you were fighting the fire, did you at any time see Mr. Salinas fighting fire?

A. Yes, he was there. But I never had time to pay no attention to anything. All I had in my mind was getting that water line going, trying to get that going.

Q. Did you see him do anything to fight the fire?

A. He was in there, but I never watched what he was doing. I didn't have time for that.

Q. No further questions.

Cross Examination

Q. (By Mr. Crane): Tommy, since they have gotten this—Tell the jury where Harold Little's house is with reference to the Rotman Store where Steve Salinas lived, and with reference to the Kotzebue Grill which Steve Salinas owned, so we will be a little more familiar with it. [318]

A. You mean in distances?

Q. Yes.

A. Well I couldn't recall how many blocks from Rotman's Store, but I would say about two blocks from the restaurant.

Q. In other words, coming from Rotman's Store, you go down to Harold Little's first, and then go on a couple of blocks to the restaurant. Is that right? A. That's right.

(Testimony of Tommy Goodwin.)

Q. Harold Little's is a new building right on Front Street, facing the Bay, is it not? Facing Kotzebue Sound right on Front Street?

A. That's right.

Q. In fact, to make it more clear, bring it out more, Harold Little's building is a new building next to the Airlines, and immediately in the rear is my yard where my office is. It's closer to Rotman's Store than it would be to the restaurant, would it not, or about half way, would you judge, Tommy?

A. Well, from Harold Little's over to Rotman's is a little bit further than that.

Q. Now around Christmas time, there was several people stopped at Harold Little's, wasn't there?

A. Oh, yes.

Q. Wasn't it more or less of a—I wouldn't say "hangout", but more or less of a place for people to drop in during the day?

A. That's one place if you are looking for somebody, you can generally find them.

Q. Or if you wanted a hot cup of coffee? [319]

A. No.

Q. Nothing unusual for Steve being there? For you or Steve being there? A. No.

Q. In fact you'd drop in there about every day?

A. Yes.

Q. You don't remember whether he came in Christmas Day, when he brought in some Christmas presents?

(Testimony of Tommy Goodwin.)

A. Are you sure it was Christmas Day or the day before Christmas? It wasn't Christmas.

Q. You wasn't probably there then?

A. No.

Q. Definitely not the 24th. It was the 25th?

A. I was up at my place the 24th, because I didn't get to town.

Q. You didn't get to town? A. No.

Q. Now just correct me if I am wrong. The way I understand from your testimony, Steve Salinas was there with Little and the gang all that afternoon and evening at Little's? Is that correct?

A. No. Like I said, I don't recall how long he stayed because I was paying no attention to nobody else. We had our own conversation.

Q. In other words, all you know is that Steve dropped in there in the afternoon?

A. That's right.

Q. And you don't know where he went when he left there? A. No. [320]

Q. Now coming to the Kotzebue Grill, did you ever do any wiring in that building?

A. No sir.

Q. Do you know anything about the condition—by the way, you are an electrician, are you?

A. Yes sir.

Q. Did you ever have anything to do—you say you never had anything to do with the wiring of the Kotzebue Grills?

A. No sir, I never have.

Q. Have you examined it?

(Testimony of Tommy Goodwin.)

A. I did, at the time when we was getting material, to see what I needed.

Q. What condition did you find it in?

A. Awful poor shape.

Q. Would you call it—when you say poor shape, would you call it more or less dangerous?

A. It is.

Q. It is dangerous? A. Yes.

Q. From a fire hazard?

A. That's right.

Q. And was prior to the fire?

A. I didn't get that.

Q. And it was that way prior to the fire, prior to the date of the fire it was a hazard? The wire in the building was hazardous?

A. That's right. [321]

Q. In other words, dangerous wiring all through?

A. The whole building is dangerous, the wiring.

Q. By the way, Tommy, if you remember, how was Steve dressed Christmas Day when he was down there?

A. I wasn't paying no attention to nobody's clothes, because I wasn't in the mood of watching what they was wearing.

Q. That's all Tommy, no further questions.

(There were no further questions and the witness was excused from the stand.)

RAY FERGUSON

is then called and sworn as the next witness for the plaintiff, and then testified as follows:

Direct Examination

Q. (By Mr. Hermann): Would you please tell the Court and jury your full name?

A. Ray Edward Ferguson.

Q. Where do you live, Mr. Ferguson?

A. Kotzebue.

Q. Were you living there in December, 1957?

A. Yes sir, I was.

Q. Whereabouts do you live in relationship to the Kotzebue Grill?

A. Well, half a block from the Grill.

Q. What direction would that be—east, west, south?

A. It would be south, I believe.

Q. Did you attend the fire at the Kotzebue Grill on the 25th of December?

A. Yes sir. [322]

Q. What was the first you heard of the fire, the first you knew about it?

A. I heard the bell first of all, the fire warning bell, I believe. Then my wife and another person came in and said there was a fire.

Q. Would you speak a little louder, please. What did you do then?

A. I grabbed the fire extinguisher that was in my place and ran over and gave it to some people on the roof. I handed it to them, and then I went back into the restaurant to try and get some water.

Q. What restaurant do you mean?

(Testimony of Ray Ferguson.)

A. Ferguson's restaurant.

Q. Where was Ferguson's restaurant in relation to the Grill?

A. Next to the Kotzebue Grill.

Q. What did you do then?

A. I tried to get some boys to carry water over.

Q. Were you successful in this?

A. Yes.

Q. Will you state whether or not you went inside the building?

A. Yes. I went inside, and I went upstairs and right below the fire there.

Q. Right below it? A. Yes.

Q. Were you able to see the fire?

A. Not the blaze itself, no.

Q. Do you know what time it was that you arrived at the fire?

A. No. But by using the time of the show I figure it was about 11:00 or 11:15, someplace in there. [323]

Q. While you were at the fire do you know whether or not the lights were on at any time in the back room?

A. They had been turned on.

Q. Were they burning at all?

A. Not in the back room, but they were on in the hall. They were on—I seen lights someplace in there.

Q. Do you recall where you saw them?

A. I believe one was in the bathroom. I am not sure.

(Testimony of Ray Ferguson.)

Q. Do you know whether or not they remained on?

A. No. Somebody splashed some water on a hot wire there and it started flashing so they called to shut the juice box off.

Q. Now, Mr. Ferguson, do you know who was the owner of the Kotzebue Grill? Before the fire?

A. I believe Mr. Salinas was. Oh, I think.

Mr. Crane: That is objected to, Your Honor. It's irrelevant, immaterial and incompetent who the owner of the building was, prior to the fire.

The Court: It may be relevant, thinking of your examination of some of these witnesses. He may answer.

Q. Would you repeat the question.

Mr. Crane: Yes or no, if your Honor please.

The Court: You may answer yes or no.

A. Not exactly, no. But I believe it was Archie Ferguson.

Mr. Crane: If Your Honor please, I object to what he believes. If the witness doesn't know——

The Court: I think he may answer to the best of his belief.

That is your belief—who did you say?

A. I believe Archie; Archie Ferguson or Beulah Levy, or the B & R.

Q. (By Mr. Hermann): What relationship is Archie to you?

A. My uncle and legal guardian.

The Court: Your uncle and legal guardian?

A. Yes.

(Testimony of Ray Ferguson.)

The Court: You say you believe he owned the building? A. Yes.

Q. (By Mr. Hermann): Have you ever lived at the Kotzebue Grill?

A. It would be about ten years ago I guess. We lived upstairs when we were small.

Q. Do you know how old a building the Kotzebue Grill is?

A. I believe a little over fifteen years, I am not sure.

Q. Do you know of an organization known as the Far North Tug and Barge Company?

A. Yes, I do.

Mr. Taylor: I object, Your Honor. This is incompetent, irrelevant and immaterial and doesn't prove any of the issues of this case, what a tug and barge company does.

The Court: Of course the materiality of any such issue does not yet appear. There has been some testimony in this case about [325] Ferguson previously owning the building, but nothing about the tug and barge company.

Q. (By Mr. Hermann): Do you know whether it was Mr. Ferguson or the Far North Tug and Barge Company that owned this building?

A. No, I don't.

Q. You don't know that? A. No, I don't.

Q. Have you been in the building since Mr. Salinas acquired it? A. Yes, I have.

Q. Have you been in the restaurant part?

A. Yes.

(Testimony of Ray Ferguson.)

Q. Would you tell us whether or not there is any difference in the furniture and fixtures in the restaurant part now than there was before Mr. Salinas owned it?

Mr. Taylor: I am going to object to that. He hasn't testified that he knew what the condition of the furniture and fixtures was before Mr. Salinas took it.

The Court: That is correct. A better foundation needs to be laid.

Q. (By Mr. Hermann): Had you ever worked in the Kotzebue Grill?

A. Not exactly. Not except for odd jobs and stuff. But I never had a regular job.

Q. What kind of odd jobs did you do? [326]

A. Just cleaning up or something like that.

Q. Do you know what kind of furniture and fixtures the Kotzebue Grill had at that time?

A. Do you mean in the restaurant part?

Q. Yes.

A. I only noticed there is a new stove put in the restaurant part.

Q. Do you know of any changes that have been made in it from the way you saw it?

A. Yes. There was a stairway inside, that let down inside the restaurant, and that was cut off, I believe, and they were using the stairway outside to go upstairs.

Q. Do you know whether there has been any change in the counter and other fixtures?

A. I don't believe it is changed since it was fixed up before he bought it.

(Testimony of Ray Ferguson.)

Q. Do you know to your own knowledge what Mr. Salinas paid for the Grill?

Mr. Taylor: Just a minute, your Honor, I am going to object. It's incompetent, irrelevant and immaterial.

The Court: The question is proper, counsel,—“of your own knowledge”—; he may answer yes or no. A. No.

Q. (By Mr. Hermann): While you were fighting the fire in the Grill did you at any time see Mr. Salinas? A. Yes, I did.

Q. Do you know whether or not he was doing anything to fight the fire? [327]

A. Not to my knowledge, I don't believe he was.

Q. No further questions.

Cross Examination

Q. (By Mr. Crane): Ray, speaking of the furnishings of the Kotzebue Grill, that counsel has asked you about, I believe at one time there was an old high counter and high stool in there. Is that correct? A. Yes.

Q. They were later changed and more modern equipment put in? A. Yes.

Q. Was that put in just before Mr. Salinas purchased it or just after he purchased it, or do you know?

A. I believe it was put in before, but I wouldn't say for sure; but I believe it was.

Q. But after Mr. Salinas purchased it, if you remember, didn't he go ahead and make a lot of improvements, redecorate and repaint?

(Testimony of Ray Ferguson.)

A. Yes, I believe he painted it. It has been fixed up a little.

Q. Did he put in some additional equipment like freezers and electrical equipment?

A. Yes, he did.

Q. He did put in a lot of extra equipment?

A. Yes.

Q. Now, how was Steve dressed the night of the fire?

A. Would you say that again.

Q. How was Steve dressed the night of the fire?

A. What I can remember, just a big coat is all, a down parka. [328]

Q. Now, Ray, the night of the fire, in the first place, that is a fairly small entrance, isn't it, going up those steps? A. Yes.

Q. I presume that when the news got around that there was a fire, practically the whole town was down there, was it not? A. Yes.

Q. You were all filing in and out trying to get to it as best you could, is that it? A. Yes.

Q. A log of congestion both upstairs and downstairs? A. Yes.

A. A lot of drunks getting in your way all the time you were there?

A. I don't believe—there was some people drinking in the other restaurant, but I don't believe they was what caused the confusion.

Q. In other words, things happened so quickly, through the entire confusion, its kind of hard to remember just what did happen. Isn't that the way it was?

(Testimony of Ray Ferguson.)

A. Would you say that again.

Q. Coming back this way, when you first went to the fire you gave them an extinguisher, and at that time they was fighting the fire on top of the house, is that right? On the roof? A. Yes.

Q. Later on you were able to get into the interior of the room where the fire was and fight it there?

A. Not personally. There was already people up there. [329]

Q. Who was the first one that organized the bucket line and got it started? Was that Tommy Goodwin and that cook?

A. I am not sure on the side upstairs part because I wasn't there then.

Q. Where did you remain?

A. I was trying to get water, mostly out of our place.

Q. I hand you defendant's Exhibit No. 7, which you will notice is a picture of a stairway of the Grill. I am not sure I explained it. Just point out with reference to the stairway where your place is, and hold it up so the jury can see, and just show what you were doing there that evening.

A. Right on this side (indicating on the exhibit), is a doorway leading out of the back entrance of the restaurant, and they had a bucket line going out the back end and up the stairway.

Q. To the fire? A. Yes.

Q. Now the water system—you have a well there in the Kotzebue Grill, do you not?

(Testimony of Ray Ferguson.)

A. Yes.

Q. The water system in the Kotzebue Mercantile, the water system in the Kotzebue Mercantile was working? A. Yes, it was.

Q. You confined your time to the Kotzebue Mercantile to getting the water bucket line across?

A. Most of it, yes.

Q. By the way, Ray, do you remember Charlie Norton—Dummy? A. Yes, I do. [330]

Q. Do you know what time it was about, in October or November, that he left Kotzebue?

A. Not the exact date, but I remember somebody saying he had left.

Q. You know he is not around there now, or wasn't at the time of the fire?

A. I am not sure.

Q. You are not certain? A. No.

Redirect Examination

Q. (By Mr. Hermann): Just one question. Is the Kotzebue Mercantile often referred to as Ferguson's? A. Yes, it is.

(There were no further questions and the witness was excused from the stand.)

ELAINE PATTERSON

is called and sworn as the next witness for the plaintiff, and then testifies as follows:

Direct Examination

Q. (By Mr. Hermann): Would you please tell the Court and jury your full name?

(Testimony of Elaine Patterson.)

A. Elaine Patterson.

Q. What is your occupation, Mrs. Patterson?

A. Office Manager for LaBow Haynes Company of Alaska, Anchorage Insurance Agency.

Q. What are your duties as office manager?

A. I have charge of the overall operation of the office, the closing, getting work out, rating policies.

Q. Could you speak a little louder, please?

A. Yes.

Q. Who has custody and control of the files and records of LaBow Haynes Insurance Co. normally?

A. I have access to all of the records.

Q. Do you know whether there is a file with LaBow Haynes Co., an account with Natividad Salinas?

A. We have one for Steve Salinas doing business as the Kotzebue Grill.

Q. I see. When did you first hear of Steve Salinas?

A. We had a letter from Mr. Salinas on July —his letter of July 24, which was received in our office on July 30, 1956, requesting rates on insurance on his building in Kotzebue.

Q. Do you have the original of that letter?

A. I do.

Q. I would like to offer the letter into evidence.

Mr. Taylor: We would like to take a look at it first, Your Honor, I believe.

(Mr. Taylor looks at a letter.)

We would object until certain figures and cer-

(Testimony of Elaine Patterson.)

tain writings in pencil are explained fully or removed.

The Court: May I see it.

(The letter is given to the Court.)

A. I can explain all of those. [332]

The Court: Well I think possibly, first you should have the letter marked for identification and then ask the witness to explain the writings.

Mr. Hermann: I would then like to have this letter marked for identification.

(A letter to LaBow Haynes from Steve Salinas is marked for identification as plaintiff's Exhibit N.)

Q. (By Mr. Hermann): Mrs. Patterson, I hand you plaintiff's exhibit N for identification and ask you if you will explain what the figures and writing below the body of the letter represent?

A. At the time I received the letter I checked the various rates. On the left-hand side it shows "Rated, P.47;" which is the page, and "L-31" with the rating book. The figures below that are computations for the rates on the building, equipment and stock. Below that, after I had checked on that, I called the local representative for one of the insurance agencies and have "called Merle. Will check to see if Gould's can write", to check to see whether or not they could write the insurance. Then I have in shorthand that I received word from—here I don't know, I don't have the date this was received—"As we approached our market for placement of coverage——"

(Testimony of Elaine Patterson.)

Mr. Taylor: I am going to object to the reading——

The Court: You asked that this matter be explained and how else can this be done? [333]

Mr. Taylor: She can explain what things are on it there, not what they are themselves.

The Court: You may explain these. All this is writing of yourself pertaining to the letter?

A. Yes sir. Getting information which I had been requested to get as to rates and so on.

The Court: Well, that is sufficient. The exhibit may then be received in evidence.

(Plaintiff's Exhibit N is received in evidence.)

Mr. Hermann: I would like to read the exhibit to the jury.

The Court: Very well.

Mr. Hermann: It is on the letter head showing Steve Salinas, owner, Kotzebue Grill, Alaska's Farthest North Restaurant, Kotzebue, Alaska, July 30, 1956, and is addressed to LaBow-Haynes Company, of Alaska, Inc., Box 627, Anchorage, Alaska, and reads as follows: "Gentlemen: A local business man has recommended your firm to carry insurance for my business in Kotzebue. I am writing this letter of inquiry for the following before I go ahead with this matter: What rate would you charge and how much per month of payment, and when can you set the time for beginning of Insurance on the following: 1 building—\$25,000.00; Fixtures & Equip.—\$10,000.00; Stock (merchandise)

(Testimony of Elaine Patterson.)

\$15,000.00; Total—\$50,000.00. Please reply as soon as possible. Yours truly, Kotzebue Grill, by Steve Salinas, Owner.” Then the figures and other writing. [334]

The Court: Did you give the date?

Mr. Hermann: Dated July 30, 1956.

A. That was the date we received it.

Mr. Hermann: Oh yes. The date it was written was July 24. The date received would be July 30, 1956.

Mr. Taylor: Written July 24?

Mr. Hermann: Typed underneath the letterhead.

Q. (By Mr. Hermann): What did you do, if anything, in respect to writing this letter?

A. I wrote to Mr. Salinas on August 7 thanking him for his request for insurance and advising him that when we approached our market for coverage we were told there was other insurance in effect on the property and that if he was still interested in insurance, if he would let us know the expiration date of the policy in effect we would again attempt to secure a rate or coverage for him.

Q. Then what happened in relation to your business with Mr. Salinas after that?

A. On August 11 he wrote a letter which was received in our office on August 17, in reply to my letter of August 7, and he advised that he had an additional \$14,000.00 in stock which had just arrived on the Alaska Steamship Company's vessel Galena, which was not covered by insurance.

(Testimony of Elaine Patterson.)

Q. Do you have the original of that?

A. I do, sir.

Mr. Hermann: I would like to have this marked for identification. [335]

(A letter signed by Steve Salinas and dated August 11, 1956, to LaBow Haynes Co. is marked for identification as plaintiff's Exhibit O.)

Mr. Hermann: I would like to move that plaintiff's Exhibit O for identification be accepted as evidence.

Mr. Taylor: I believe I would like to see that also, Your Honor.

(The exhibit is given to Mr. Taylor.)

And I think I would just like to see the one she just read.

The Court: That may be produced if you require it; the letter which the defendant testified to dated August 7—it would be a copy of the letter?

A. That's right sir.

Mr. Taylor: We have no objection to the introduction of this letter.

The Court: It may be received. Do you wish the copy too, counsel. It may be received if it has any value.

Mr. Taylor: I think we should show the whole correspondence, Your Honor, from both ends.

The Court: Very well. The copy of the letter of August 7 may likewise be received.

(Plaintiff's Exhibit O is received in evidence.) [336]

(Testimony of Elaine Patterson.)

(Plaintiff's Exhibit O, a letter (copy) from LaBow-Haynes to Steve Salinas dated Aug. 7, 1956, is marked for identification and admitted in evidence.)

Mr. Hermann: If Your Honor please, I would like to read both Exhibits O and P, the letter of August 7 is Exhibit P, and the letter received August 17, Exhibit O, to the jury.

Mr. Taylor: If Your Honor please, I believe he should also read the copy of LaBow Haynes letter to Mr. Salinas.

The Court: That is what he just stated, counsel. He is going to read both.

Mr. Hermann: (reading), "August 7, 1956, Mr. Steve Salinas, Kotzebue Grill, Kotzebue, Alaska. Dear Mr. Salinas: Thank you for your letter requesting an insurance quotation on your property in Kotzebue. When we approached our market for the rating of this coverage, we were advised that there is now insurance in effect on the property. If you are still interested, please advise us of the expiration date of the insurance now in force, and we will again try to secure a rate for you. Yours very truly, LaBow Haynes Company of Alaska, Inc., by Elaine Patterson."

And then Exhibit O, "August 17, 1956," stamped in, "Kotzebue Grill, Kotzebue, Alaska, August 11, 1956, Steve Salinas, Owner, Alaska's Farthest North Restaurant. LaBow Haynes Co. of Alaska, Inc. 225 East Fifth Avenue, Anchorage, Alaska, Attention: Elaine Patterson, [337] Gentlemen: In

(Testimony of Elaine Patterson.)

reply to your letter of August 7—I have an additional \$14,000.00 in stock, just arrived on the Alaska Steamship Co.'s vessel "Galena", which is not covered by insurance. This stock will last at least until the arrival of the June boat in 1957. Therefore, I would like to know your rate for this stock. Regarding insurance in effect, it expires in the spring of 1957 but I am not too well satisfied and since reports concerning your company have been most favorable, thought perhaps you could give me a quotation. I would appreciate your answer to this letter and will be happy to give any information needed. Very truly yours. Steve Salinas" and type written "Steve Salinas".

Q. (By Mr. Hermann): Mrs. Patterson, did you ever confer with Mr. Salinas himself concerning this insurance?

A. Yes. I wrote him on August 29 that it would be necessary for us to place the coverage which he had requested, the \$14,000.00, if we placed that, through Lloyd's of London and that we could probably finance it the same—

Q. Was that another letter?

A. That was August 29.

Q. This is your copy?

A. This was our copy of the letter to him. And that I planned to be in Kotzebue on Sunday and would talk to him at that time.

Mr. Taylor: Was that in '56?

A. 1956, yes.

(Testimony of Elaine Patterson.)

Mr. Hermann: I would like to have this marked for identification [338] purposes only.

(A copy of a letter dated August 29, 1956, to Steve Salinas from LaBow Haynes Co. is marked for identification as plaintiff's Exhibit Q.)

Mr. Taylor: No objection.

The Court: The exhibit has not yet been offered.

Mr. Hermann: At this time I will offer it.

The Court: Is this letter of August 29, the one to which Mrs. Patterson testified? A. Yes.

The Court: Very well, it may be received.

(Plaintiff's Exhibit Q is received in evidence.)

Mr. Hermann: I would like to read it to the jury.

The Court: Very well.

Mr. Hermann: "August 29, 1956. Mr. Steve Salinas, Kotzebue Grill, Kotzebue, Alaska. Dear Mr. Salinas: Thank you for your letter with further regard to insurance which you wish to place through our office. It will be necessary for us to place this coverage through Lloyd's of London, and we believe that it would be possible to write fire and extended coverage insurance in the amount of \$14,000 for about \$900 for the first year. This premium could be financed in the same manner as that which we have for the Far North Tug and Barge Co. I plan to be in Kotzebue with the Arctic [339] Alaska Tour on Sunday, and will stop in to see you at that time if you have any further questions

(Testimony of Elaine Patterson.)

that I might answer for you. Yours very truly, LaBow Haynes Company of Alaska, Inc., by Elaine Patterson". And there is handwriting on the bottom.

A. That was the order which I took. I took this letter with me when I went to Kotzebue and this was the amounts that he requested that we place for him at that time. I had written them on the letter.

Q. (By Mr. Hermann): You had written it on the letter?

A. At the bottom of the letter in writing: "Sept. 4", the year is not written. "\$18,000 stock, \$7,500 equipment, \$24,500 building".

Q. Now Mrs. Patterson, is that the same figure as the one which he requested?

A. No. There is some difference in that. The final amount he decided he wished to place was somewhat different than what he originally requested.

Q. Do you know what the difference was?

A. The letter is there. I believe it was \$25,000.00 on the building and \$10,000.00 on the furniture and fixtures, I believe, and \$15,000.00 on the stock; where it was changed—the amount was changed from \$25,000.00 to \$24,500.00 on the building, and the fixtures and equipment from \$10,000.00 to \$7,500.00 and the stock was changed from \$15,000.00 to \$18,000.00.

Q. Was any particular reason mentioned by Mr. Salinas for the changes in figures?

(Testimony of Elaine Patterson.)

A. I don't recall sir.

Q. You don't know why they were changed?

A. No sir. [340]

Q. Now, how, if you know, was this policy to be paid for? Was it to be paid in advance?

A. No. It would be paid on the installment basis. We would finance it with a 20% down payment and then a monthly payment to be made after the down payment.

Q. I see. What was done with respect to that?

A. He signed a finance contract form. However, it was not completed at that time. He signed it in blank since I didn't have the placing of the coverage or anything, and then I made it up and completed it at the time when we received the policies and so forth.

Q. Do you have that contract?

A. Yes sir.

Mr. Hermann: I would like to have this marked for identification.

(A premium Finance Contract signed by Steve Salinas on Sept. 3, 1956, is marked for identification as plaintiff's Exhibit R.)

Mr. Taylor: No objection.

Mr. Hermann: At this time I would like to have plaintiff's Exhibit R for identification accepted as evidence.

The Court: The exhibit may be received.

(Plaintiff's Exhibit R is received into evidence.)

The Court: Possibly it should be made clear to

(Testimony of Elaine Patterson.)

the jury. Are LaBow Haynes Co. agents or insurer? [341]

Q. (By Mr. Hermann): Would you explain that, please.

A. Yes sir. We are agents and brokers. We represent various companies and we don't issue the policies. We aren't personally liable for insurance which is taken out. It is placed with companies, either domestic or surplus lines, such as Lloyds of London.

Q. On this form "Alaska Bancorporation" would you explain what that is.

A. That is actually a financing agency in Anchorage.

Q. It is not an insurance company?

A. No, it is not.

Q. They were then the ones that would finance the contract?

A. They would have, normally. However, we did not put it through them. We went ahead and remitted the amount of the premium to the Company ourselves, and we, in this particular case, took the payments as they came up. In other words, we advanced the premium to the Company and the payments, then, were made to us.

Q. Actually, then, this form was confined to your own use?

Mr. Taylor: Just a moment, Your Honor, I am going to withdraw my objection to this under the testimony of the witness.

The Court: Your objection?

(Testimony of Elaine Patterson.)

Mr. Taylor: I beg your pardon. I am withdrawing my consent to the introduction and object to it now, as the witness testifies that this contract was not put in effect with the parties named in the contract, so it would be a mere nullity and have no bearing on the issues in this case. [342]

Mr. Hermann: I think it would, Your Honor.

The Court: Just a minute. I cannot see what difference it would make, counsel. The finance contract, the premium finance contract appears to have been paid on behalf of the Alaska Bancorporation. The witness, who is the manager of LaBow Haynes, said they elected to handle it themselves. I cannot see where it would make any difference.

Mr. Taylor: It would not be a contract then, between them and I don't believe such a contract would be competent, relevant or material to the issues. And I think the policies themselves, Your Honor, or a daily report of those policies would be.

The Court: Doubtless they will be produced. This may have some value.

Mr. Taylor: Who to?

The Court: Well I am not going to comment on the evidence. It may be received.

Mr. Hermann: I would like to read the contract to the jury.

(Plaintiff's Exhibit R is then read in its entirety to the jury by the United States Attorney.)

The Court: May I see that again.

(The exhibit is given to the Court.)

(Testimony of Elaine Patterson.)

I noticed as you read it that the names, the schedule, the listed schedule of policies, these show expiration dates of 9-3-57. Do you propose to show these were renewals? [343]

Mr. Hermann: Well, we propose to show that one policy is a renewal and the others new policies issued on the same basis.

The Court: Oh. Very well. Mrs. Patterson, do you have the policies referred to in this finance contract?

A. I have our daily report of those policies.

The Court: Would they be material? Rather than clutter up the record, if there were renewals or extensions—isn't that all that would be necessary. If these policies expire in effect in 1957 they could not be of much value.

A. We have the renewal policies also. I have the renewal policies also.

Mr. Taylor: May we take a recess at this time?

The Court: Yes. We will take a recess for ten minutes.

(Thereupon at approximately 3:05 a recess was taken, the jury being first duly admonished.)

After Recess

(Both counsel stipulate as to the presence of the jury; the witness on the stand at recess resumes the stand for further direct examination; and all other necessary persons again being present, the trial resumes.)

Q. (By Mr. Hermann): Mrs. Patterson, I be-

(Testimony of Elaine Patterson.)

lieve you testified last, that the policies referred to in the Bancorporation contract, the finance contract, were issued, and renewed later by other policies? Is that correct? [344] A. Yes.

Q. Do you have these policies? A. Yes sir.

Q. Do you have the one on London Assurance, No. 511348.

A. Yes. That was the policy from '56 to '57, together with the renewal certificates for '57 to '58.

Q. That one had a renewal certificate rather than a new policy? A. That's right.

Mr. Hermann: Let's finish with this one first. I would like to have this labeled for identification.

The Court: Well, I think we had already identified it.

Mr. Hermann: I would like to move it into evidence.

The Court: What was the renewal term, another year?

A. Another year, yes.

Mr. Taylor: No objection.

The Court: The policy and renewal certificate may be received.

(A policy from London Assurance to Steve Salinas, No. 511348, together with attached renewal certificate is marked for identification and received in evidence as plaintiff's Exhibit S.)

Q. (By Mr. Hermann): Would you tell us what term this was to run?

A. The policy as originally written was for a

(Testimony of Elaine Patterson.)

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Q. (By Mr. Hermann): Would you tell us what term this was to run?

A. The policy as originally written was for a

(Testimony of Elaine Patterson.)

period of one year, Sept. 3, 1956, to 1957, Sept. 3.

Q. Where would we find that on the policy?

(The witness indicates on the Exhibit.)

A. The term is near the head of the page. Yes, here, from Sept. 3, 1956 to Sept. 3, 1957.

Q. Where is the amount of this policy shown, the amount of coverage?

A. On the policy for the first year it is shown in this portion of the policy (indicating); on the renewal policy it is shown here on the certificate (indicating).

Q. Now as to the Lloyd's of London policy, No. 65688, do you have the policy here?

A. Yes sir. That was for a period from Sept. 3, 1956 to Sept. 3, 1957.

Q. And do you have the renewal?

A. Yes sir. That was one from 1957 to 1958.

Mr. Hermann: We would like to put them together for this purpose.

Mr. Taylor: No objection, your Honor.

The Court: They may be admitted. The policy and renewal certificates may be attached.

Mr. Hermann: Actually, it is a renewal policy.

The Court: The two policies may be attached together and received as an exhibit. That one has a renewal endorsement on it?

A. No, I don't believe so. It has an annual plan endorsement. That's right. It shows it can be renewed at a reduction in rate which was given on renewal policies, although this is a new policy. On Lloyd's certificates they won't issue a renewal certificate. They issue a new policy.

(Testimony of Elaine Patterson.)

Q. (By Mr. Hermann): Would you put these in order then, with the renewed policy on top, the latest policy on top. I would like to offer them——

The Court: They have been ordered received.

Mr. Taylor: No objection. [346]

(Policy No. 65688 and Policy No. 68021, the renewal policy, are marked for identification and admitted in evidence as plaintiff's Exhibit T.)

Q. (By Mr. Hermann): Was there any difference between the amount of the policy and the renewed, new policy? A. No sir.

Q. They were substantially the same?

A. Yes sir.

Q. How much was that one for?

A. That one was for \$20,000.00, I believe. The first year was for \$20,000.00, renewed for \$20,000.00; then they reduced that one. After the renewal they reduced it to \$10,000.00, but that additional \$10,000.00 was changed over to the other policy, so the total amount of the policies was the same.

Q. This particular policy was reduced to \$10,000.00? A. The second year. That's right.

Q. In regard to policy No. 65689, Lloyd's, was there a new policy issued on that one?

A. Yes sir.

Q. Do you have the old policy also? [347]

A. Yes sir.

Q. Would you put them together, with the renewed or new policy on top.

(After the witness does so, the items are shown to defense counsel.)

(Testimony of Elaine Patterson.)

Mr. Taylor: No objection, your Honor.

The Court: These policies, the original and the renewal, may be received as one exhibit.

(Policy No. 65689, and the renewal policy, No. 68022, are marked for identification and received in evidence as plaintiff's Exhibit U.)

The Court: What company did you say this was, this last one?

A. That was Lloyd's of London, also.

Q. (By Mr. Hermann): Would you give us the amount of London Assurance, this last one?

A. Those were \$3,000.00.

Q. That was the first one, London Assurance; that was \$3,000.00. And this last one?

A. This was \$27,000.00 and——

The Court: The renewal for London Assurance was \$3,000.00?

A. Yes.

Q. (By Mr. Hermann): Now in regard to these last two, that is a policy and renewal policy, was there a change in the amount shown?

A. Yes there was. Also on this policy in the first year it was in [348] the amount of \$27,000.00 and was renewed in the amount of \$27,000.00, and underwritten to increase that to \$37,000.00, the difference between that and the other policy. The total remains the same.

Q. Was the distribution of the insurance changed, that is, as to quantity of the property?

A. That was not changed at any time as to building and fixtures.

(Testimony of Elaine Patterson.)

Q. That was never changed between the first policy and any of the renewals? A. No sir.

Q. What was the total amount of insurance carried from September of 1956 up until the time of the fire?

A. The total would have been \$50,000.00.

Q. Now has any demand ever been made for payment of any of that insurance?

A. We had a letter from Mr. Taylor advising of the loss.

Q. Do you have the original of that letter?

A. Yes sir.

Q. Will you remove it from the file please. What was the date you received that letter?

A. It was written on March 3, 1958 and we received it on March 5, 1958.

Mr. Hermann: I would like to have this labeled for identification.

The Court: Again we can skip the identification if the letter is not objected to.

Mr. Hermann: I will offer it in evidence then.

Mr. Taylor: I would like to see this one. [349]

(The letter is shown to Mr. Taylor.)

Mr. Taylor: No objection.

The Court: The letter may be received.

(A letter dated March 3 from Warren A. Taylor to LaBow Haynes Co. is marked for identification and received in evidence as plaintiff's Exhibit V.)

Mr. Hermann: I would like to read plaintiff's Exhibit V to the jury.

(Testimony of Elaine Patterson.)

Mr. Taylor: Just a minute, your Honor. If Mr. Hermann is going to read that, I am going to insist that he read all the exhibits, your Honor. I don't think he can single out any certain exhibit and read it just because it's convenient, where he has other exhibits.

The Court: I think that is entirely the privilege of the person examining the witness. If you wish the other exhibits read entirely to the jury, that you may do. He may read it.

(Plaintiff's Exhibit V is read in its entirety to the jury by Mr. Hermann.)

Q. (By Mr. Hermann): Do you know to your own knowledge that this letter was answered?

A. Yes sir. Mr. Dimmick, who is the manager of the agency, answered a portion of it, and I answered a portion of it with the return premium.

Q. You returned the unearned premium? [350]

A. That is correct. We returned that unearned premium and I sent that letter of transmittal myself.

Q. Do you have a copy of that letter?

A. Yes sir.

Mr. Hermann: I would like to introduce the copy in evidence.

Mr. Taylor: I take it that's a partial reply to my letter?

A. All I had anything to do with was the return premium.

The Court: It may be received.

(A copy of a letter from LaBow Haynes to

(Testimony of Elaine Patterson.)

Warren A. Taylor, dated March 24, 1958, is marked for identification and received in evidence as plaintiff's Exhibit W.)

Mr. Hermann: I would like to read plaintiff's Exhibit W to the jurors.

(Plaintiff's Exhibit W is read in its entirety to the jury by Mr. Hermann.)

Q. (By Mr. Hermann): Would you state what the word "enc." means.

A. That was the check which we forwarded.

Q. I see. Did you state there was another letter written in answer to Mr. Taylor's inquiry?

A. Yes sir. Mr. Dimmick wrote to Mr. Taylor.

Q. Do you have that letter? [351]

A. Yes sir.

Q. Where did you get the letter?

A. That was a part of our file.

Mr. Hermann: I would like to have this received in evidence also.

Mr. Taylor: No objection.

The Court: The copy of the letter may be received.

(Copy of a letter from E. T. Dimock of LaBow Haynes to Mr. Warren A. Taylor, dated March 29, 1958, is marked for identification and received in evidence as plaintiff's Exhibit X.)

Mr. Hermann: I would like to read plaintiff's Exhibit X to the jury.

The Court: Yes.

(Plaintiff's Exhibit X is read in its entirety to the jury by Mr. Hermann.)

(Testimony of Elaine Patterson.)

Q. (By Mr. Hermann): Mrs. Patterson, was any record kept of the actual payments made on these policies? A. Yes sir.

Q. What kind of a record was that?

A. Our regular bookkeeping account card. [352]

Q. Is that the type of card you customarily keep in the operation of your business?

A. Yes sir.

Q. Do you have that? A. Yes sir.

The Court: You are referring to the record of payment of premiums?

A. Yes sir. The payment of premiums.

Q. Is this an original record or a copy?

A. Ours is the copy. Our bookkeeping records are copies.

Q. Do you keep the originals of the entries?

A. No sir.

Q. What becomes of the original?

A. Ordinarily those go to the assured.

Q. Were the entries on this all made on the same day or on separate days?

A. No sir. Over a period from, well, actually from October of 1956 until March of this year.

Q. Was any original record including all of that kept at all? A. No sir.

Mr. Hermann: No sir. I would like to move the account sheet be introduced in evidence.

The Court: I fail to see the purpose in it.

Mr. Hermann: The purpose, I plan to show the habits of the defendant in paying his insurance. As

(Testimony of Elaine Patterson.)

a general rule he was behind [353] in the payments, and made large payments shortly——

Mr. Taylor: Just a moment, your Honor. We are going to object. It shows to the contrary to the exhibit that he was ahead on his payments.

The Court: I asked the United States Attorney for what purpose this is offered and I think his answer is quite proper. Whether or not it shows what he purports to have it show is a question for the jury. Otherwise I could see no relevancy in it. If it has any evidentiary value it may be received in evidence.

Mr. Crane: If your Honor please, I don't think this exhibit is properly identified and properly explained. If counsel will further explain the entries on it as to what the actual figures are——

The Court: Well I thought she explained it as a copy of the bookkeeping entries with reference to payment of premiums by Mr. Salinas.

Mr. Crane: It's a little difficult, your Honor, to know just the meaning of the figures.

The Court: Well, she may explain it further then. You might explain whether this is a book of original entry or a page from such book.

Mr. Hermann: I believe I did inquire as to that.

The Court: Possibly you did.

A. It is our bookkeeping record. The book, our permanent record of the person's account made in the regular course of business. I previously stated there was no original, we have no original showing all the entries. [354]

(Testimony of Elaine Patterson.)

Mr. Crane: They haven't shown what they are made from, your Honor.

Mr. Hermann: I was getting ready to go into that.

The Court: Very well. You may show from what source these entries were made.

Q. (By Mr. Hermann): Would you explain from what source these entries are made. Take the first entry and explain.

A. Well, our books are kept under the Hadley system, which is the Hadley system of bookkeeping and which is quite common with companies. There is a statement which is the same thing as this record, is a duplicate statement. This entry is made and also goes on the company record. There are two carbon copies, an entry also being made for the company this represents, that we made payment. These, as I say, are for the period of 1956, and this one shows the date of 9-3-56. The first entry is where we began to bill for the policies which had been written. Then it gives the dates right straight through the entries.

Q. What would be the source of these three first entries then?

A. The invoices which we make up at the time we bill the policies and mail them to the assured.

Q. What are the first column of figures?

A. These are charges.

Q. What is the second column?

A. The second column is credits and the third column is the balance, so the fourth column is the

(Testimony of Elaine Patterson.)

previous balance. That is, under this system, [355] a cross reference as far as balancing the accounts in the books.

Q. The shaded column next to the edge?

A. The balance previous to this, and that is carried over here (indicating). That is a cross-reference to the bookkeeping system.

Q. And the other columns are charges, credits and balances? A. Yes sir.

Q. And the balance there is then the new balance?

A. The new balance on the account. Right.

The court: I think the testimony of the witness shows it conforms to the shopbook rule. It is not necessary in such case to prove each invoice.

Mr. Taylor: There is some things wrong there. Some items don't show the years.

A. The years are all shown there.

Mr. Taylor: They are all shown?

A. Yes sir.

The Court: They are shown.

Mr. Taylor: I would like to have her point out the year please.

A. Here is 1956 (indicating); then January 1957 (indicating), and so on to 1958. Those are 1958 (indicating).

Mr. Taylor: You would have to be a mind reader.

A. These are all in chronological order. At the beginning of each year we stamp them for the new year. There is a stamp here at the beginning of 1957, and a stamp at the beginning of 1958 and all

(Testimony of Elaine Patterson.)
of these entries here are for 1958 and carried through. [356]

Q. (By Mr. Hermann): Would you like to put '57 and '58 there?

A. Yes, if you would like me to.

(The witness marked the exhibit.)

The Court: Now you are asking the witness to alter records, an original record; but if it is your request I suppose it is all right. You are asking her to add the date. I think she testified this date is shown once each year. Was it at the head of the column?

A. At the side of the column.

The Court: Very well. It matters not. The exhibit may be received in evidence.

(A bookkeeping card is received in evidence as plaintiff's Exhibit Y.)

Q. (By Mr. Hermann): Now, Mrs. Patterson, where is the first indication of a payment on this exhibit, plaintiff's Exhibit Y?

A. That would have been the one we received in our office December 7, 1956.

Q. Can you state what was the amount of that payment?

A. The amount of that payment was \$1,500.00.

Q. Can you state whether or not that payment was timely, past due or in advance?

A. It would have been—most of it was past due. However, it paid a portion of the premium payment for—let's see—it would have been the [357] January payment.

(Testimony of Elaine Patterson.)

Q. In other words, this was the first payment that you received.

A. This was the first payment we received.

Q. And I believe you testified Sept. 3, 1956, was the date of the original policy? A. Yes.

Q. When was the next payment made?

A. The next one was February 14, 1957.

Q. How much was that? A. \$175.00.

Mr. Taylor: If your Honor please, for the purpose of saving time, I believe instead of this—the exhibit speaks for itself. Let the United States Attorney read it to the jury. It is going to be admitted——

The Court: Again that is the privilege of the United States Attorney. It is not up to you or me to tell the United States Attorney——

Mr. Taylor: I was just making a suggestion that might save some time. I was trying to be helpful.

The Court: It is up to you. If you wish to read that to the jury you may do so.

Q. (By Mr. Hermann): Under item of credits in column 2 of the columns of figures, on 2-14-57 payment was made of \$1,500.00. This is the first payment, the first credit in this column? [358]

A. That was 12-7-56.

Q. On 2-14-57, February, another payment of \$175.00 was made, and on 2-23-57 a payment of \$300.00 was made by check?

A. That is correct.

Q. On 4-4-57, which would be April, or two months later, a payment of \$463.51 was made, and

(Testimony of Elaine Patterson.)

on 5-29-57 a payment of \$245.00; on 6-3-57 a payment of \$589.16 was made? A. Yes sir.

Q. On 8-8-57 a payment of \$1,000.00 was made and this one I would like you to explain.

A. That is August 8. The payment was a payment in advance for the down payment on renewal of the coverage for the year 1957 to 1958.

Q. Not on the previous policy?

A. No. The previous policy for 1956 to 1957 had been paid for and at this time this was an advance payment for renewal on the renewal of the insurance coverage for the new year, and that was a thousand dollars.

Q. Then continuing in the credit column for the payments, there is three blank days, and another payment of \$1,000.00 on Nov. 5, 1957, by check was made. And then another payment on Jan. 15, 1958 of \$314.75—

A. Those were credits, I believe for the return premium.

Q. What would be the last payment?

A. The last payment would be the \$1,000.00 check. See—here are two items, check items, one in August and one in November—

Q. I see. During the first year of the policy was the payment generally made in advance? [359]

Mr. Taylor: Just a minute, your Honor. I am going to object. It's incompetent, irrelevant and immaterial. I believe that exhibit speaks for itself.

The Court: That is probably true. The witness said the exhibit shows the charges accrued and then

(Testimony of Elaine Patterson.)

it shows the credits. Then I would think the exhibit shows for itself.

Q. (By Mr. Hermann): Does the exhibit show whether the policy is paid to date at any given entry?

A. No sir. Not until the final one here of June 3, 1957, since it was on a final one, and that doesn't actually reflect in here. It was paid at the time of June 3, 1957.

Q. The final payment of the year?

A. That's right sir.

Q. Well, I would like to ask then, was it usual during the year of 1956-1957, the insurance year, whether it was generally or usually paid in advance or usually behind in payment?

The Court: I think the exhibit shows the circumstances here.

Mr. Hermann: She testified that it didn't.

The Court: That it did not show for itself? I couldn't quite get what you meant. Very well then. She may answer, if the exhibit does not show for itself.

Mr. Taylor: Just a moment. I am going to object, because the exhibit does show for itself. It shows the man got \$946.99 refund after cancellation. [360]

The Court: May I have that exhibit. I don't pass on the weight; again, I merely pass on whether it is proper.

(The Court examines the exhibit.)

It seems to me, Mr. Hermann, that this exhibit

(Testimony of Elaine Patterson.)

does speak for itself. It shows the dates of charges, according to the entries—as I understand it, and then it shows the date upon which credits were received, payments against these charges, and the balance. Why doesn't it speak for itself? May I see it again?

(The exhibit is returned to the Court for further examination.)

Objection then will be sustained.

Q. (By Mr. Hermann): Mrs. Patterson, in the event of a total loss by fire, is the amount of the policy necessarily the amount that is paid to the insured person?

Mr. Taylor: Just a minute, your Honor, I think that is a matter of the policy itself. I think it's a part of the contract between LaBow Haynes and the defendant. I think if the contract shows it I think that's the way to do it, not to go by what she believes it would show.

The Court: If the contract of insurance reflects the matter of how loss payments are adjusted and paid then she may not say orally.

Mr. Hermann: No further questions.

Cross Examination

Q. (By Mr. Taylor): Mrs. Patterson, how long have you been in the insurance business?

A. About eleven or twelve years, I would say.

Q. Has that experience been in Anchorage?

A. Four years of it has been here; four years in our Seattle office, two years of that time working with the Anchorage agency.

(Testimony of Elaine Patterson.)

Q. How long has LaBow Haynes Company been in business in Alaska?

A. Since 1949, I believe it is.

Q. And that Company has a lot of agencies in the west? A. No sir.

Q. How many?

A. Seattle and this office are the two LaBow Haynes Company offices.

Q. Now Mrs. LaBow—I mean Mrs. Patterson, calling your attention to plaintiff's Exhibit Y, now that shows the payment, the credits and payments on this policy from, I believe, the time they were first issued? A. Right sir.

Q. Did you ever object when Mr. Salinas was behind in his payments?

A. Yes, I wrote to him.

Q. You would send him a bill, would you?

A. Yes sir.

Q. Then he would send you some money?

A. Part of the time, yes.

Q. I believe you said you put the policy under a contract in which he was to pay the equivalent of some four hundred or some three hundred, or \$244.00—\$244.58.

A. I believe \$244.58 were the monthly payments, yes.

Q. Isn't it a fact, Mrs. Patterson, that you carry many of your customers in the same similar manner that you carried Mr. Salinas? [363]

A. No, I wouldn't say so.

Q. What? A. No, I wouldn't say that.

(Testimony of Elaine Patterson.)

Q. You were satisfied then, after your first year of experience with Mr. Salinas, that you renewed his policy for another year? A. Right sir.

Q. Evidently your business relations with Mr. Salinas were satisfactory?

A. Yes. He paid the premiums eventually, although there were delinquencies in the payments.

Q. Did you realize that at times much of the year's business was a little slow?

A. Under the contract payments are still due, however.

Q. But you say that you did not go by that contract that you put into evidence here. You say that was assumed by you?

A. Yes. We sent him statements, though, on this basis.

Q. On this basis? But you say this was not put into effect? A. Not with the bank.

Q. This doesn't mean a thing then, does it?

A. Except that he agreed to make those payments in there.

Q. Have you got the contract?

A. Not with him.

Q. You have no contract with Mr. Salinas but you have this contract with the Alaska Bancorporation, is that right?

A. He has that, which is what he signed his name, to make certain payments. The payments were not made in advance and up to date, so at no time could we actually put it through the bank, because the payments were not [364] made up to

(Testimony of Elaine Patterson.)

date. Until such time as the policy continued long enough we couldn't. And we have to have a down payment and any monthly payments which would be due, and any payments which would be due ten days prior to the time of the next payment before we are able to enter that with the bank.

Q. But this contract was never in effect that was written, was it? A. No sir.

Q. Now what was the premium on those risks of Mr. Salinas at Kotzebue? What was the premium rate?

A. It would be in the records; I don't know.

The Court: Are you speaking of two different things, counsel?

Q. (By Mr. Taylor): I want the premium rate.

A. The rate or the premium—well, it would be on the policies—I don't remember what the rate is. It is the regular published rate.

Q. Published where?

A. That is in the Miscellaneous Rate Book for Alaska as put out by the Fire Rating Bureau. We don't have the Rate Book here.

Q. What rate is in the insurance policy?

A. The rate for the first year was \$5.44 as building and equipment, and \$6.06 on the stock coverage. That is per hundred dollars of value. And at 16c for extended coverage insurance, and that applies to the total amount.

Q. 16c you say?

A. Yes, for extended coverage.

Q. Just for the benefit of the jury, would you explain to the jury what that is? [365]

(Testimony of Elaine Patterson.)

A. It would be coverage by reason of storm damage, hail, windstorm, explosion, motor vehicle damage, aircraft damage, motor vehicle damage, running into a building, riot, civil commotion. I think those are the main portions of it.

Q. Then if he had a loss from any other cause than actual fire—say the building caved in from heavy snow.

A. There would be no coverage for that.

Q. He would be paying a premium of \$6.22, would he not? A. Per hundred.

Q. Per hundred? A. Yes.

Q. Then the following year how much insurance was carried? A. A total of \$50,000.00.

Q. How much? A. \$50,000.00.

Q. Then the renewal was at the same rate?

A. No. The rate for the second year was \$4.67 for the building and equipment.

Q. What?

A. \$4.67; and \$5.20 on stock; and the extended coverage was .137.

Q. The extended coverage went up then?

A. No. It went down. It was 15c before and on the renewal it was .137.

Q. .137. Then by reason of your favorable experience over that first year, then, you got a reduction?

A. No. That is normal with the policies and the annual renewal endorsement on the policy, which reads "In consideration of the premium, and the [366] stipulations, terms and conditions of the pol-

(Testimony of Elaine Patterson.)

icy to which this endorsement is attached, it is agreed that the insured shall have the option to renew this policy annually for . . . successive years, pursuant to the terms of the forms then current, by the payment of a premium calculated at nineteen point five percent for fire and at nineteen point five percent for all other perils insured against, of the then current five year term rate—" and so forth.

Q. That's a reduction by endorsement—

A. It's a normal endorsement.

Q. Then the average would be the same?

A. Not necessarily, because it is based on the then current five year term rate. In the event the rates or term rules change, then changes occur in the rates.

Q. Now when you came to Kotzebue—I believe you did go to Kotzebue—did you not? A. Yes.

Q. You inspected the risk?

A. No sir. I was at the building but I didn't inspect the risk. I mean I had a meal there and talked to him.

Q. When did you go to Kotzebue?

A. It was Labor Day, which I believe was September 3 of 1956.

Q. Did you see Mr. Salinas there?

A. I did.

Q. You were not interested in the risk while you were at Kotzebue?

A. I am not qualified to judge a risk. He had asked to place a certain amount of insurance and that was the amount I placed. [367]

(Testimony of Elaine Patterson.)

Q. Took no pictures of it? A. No sir.

Q. And that renewal was the same amount?
\$50,000.00? A. Right sir.

Q. Now then, on January 3 of this year you wrote a letter cancelling Mr. Salinas' insurance?

A. Cancellation notices are sent; those are standard forms. Right sir.

Q. Was that by reason of the fact that he had suffered a small fire on Christmas Day of 1957?

A. I was requested to have the policy cancelled by Mr. Dimock, who is the Manager of the office. I don't know what his particular reasons were for it. He asked me to have them cancelled.

Q. Then what was the effective date of that cancellation?

A. An effective date—you have to give ten days notice. You have to give ten days notice to a mortgagee on the policy, plus the normal time for a letter to arrive at the destination, which we normally allow two days for.

Q. Did you realize there was no mortgage on that place, although you wrote to Mutual?

A. No sir. We had not been advised of that fact.

Q. The mortgagee had not advised you?

A. Well, the assured normally advises us. However, we were never advised by either the mortgagee or the assured.

Q. Was the total amount payable to the mortgagee? A. Total amount of what?

Q. Of insurance if loss occurred? [368]

A. No sir. Under "as therein many appear——"

(Testimony of Elaine Patterson.)

Q. As therein would appear, yes.

Now as the exhibit shows here (Exhibit V), this letter to Mr. Salinas indicates, to LaBow Haynes rather, indicates that Mr. Salinas was just notified within the past few days of this. Now isn't it a fact that since you gave that notice on January 3, 1958, that the policies had been cancelled that Mr. Salinas paid to your firm something like fifteen or sixteen hundred dollars?

A. I don't understand your question sir.

Q. Well, you gave a notice stating that the insurance would be cancelled on the 15th day of January, 1958. You have since collected about fifteen hundred dollars from Mr. Salinas?

A. No sir, we have not. These are the return premiums which were allowed (indicating on Exhibit Y). The last check we received was on November 5. These are return premiums which are also credited to his account. This is the amount credited to him; this credit column. These all go to his account.

Q. Well, if he had a credit of that amount, why is it he received only \$946.99 back.

A. He paid us altogether \$2,000.00, and we allowed him return premiums for the unearned portion of time the policies were in effect, and then have remitted a check for the balance which would be due.

Q. How many months was that insurance in effect?

A. Well, let's see, from September 3 to January

(Testimony of Elaine Patterson.)

15, that would have been a little over four months.

Q. So then what was the total yearly premium from 1947 to—from 1957 to 1958?

A. The total amount of the premium was \$2,583.11.

Q. \$2,583.11. So then he had insurance in effect four and a half months and he got back \$946.00 then, is that right?

A. Yes. That was the amount of the check we gave to him.

Q. Then for that four and a half months you charged him \$1,627.00.

A. Whatever the balance is. I don't know what it would amount to.

Q. Do you know whether or not any adjuster has ever been sent to Kotzebue to adjust the loss that there was notification of?

A. Not to my knowledge. We haven't to my knowledge. We haven't been notified by letter from the assured. The first notification we had was from you.

Q. You introduced in evidence here a letter which indicated you had heard about the fire.

A. That you had written to us advising us of the fire.

Q. Do you know whether your Company in Anchorage made an adjustment?

A. We had sent, at your request, a proof of loss form to you. Now those would have to be submitted to us. I don't know whether that has been done or not.

(Testimony of Elaine Patterson.)

Q. I just got them. I brought them here the other day.

A. They were sent on April 7.

The Court: Counsel, of course you shouldn't testify without being sworn. Perhaps there would be no objection to that. [370]

Q. (By Mr. Taylor): So I take it now, Mrs. Patterson, from your statements, that no proof of loss has been filed up to date?

A. It hadn't at the time I left Anchorage.

Q. It had not at the time you left Anchorage on Saturday morning? A. No sir.

Q. Now at the time you were at Kotzebue isn't it a fact that you were asked, your Company was asked by Mr. Salinas to have an estimate made as to the value of the building, stock and fixtures?

A. No sir, I don't believe so. Not to my knowledge.

Q. Not to your knowledge?

A. No sir. We don't normally do that. We don't send anyone out, especially in those areas, and we don't do it even in the Anchorage area.

Q. A policy of \$50,000.00 at a fairly remote distance, you were more interested in the premium than you were in the loss, is that correct?

A. We had been requested to place a certain amount of coverage and that is the amount we placed for the assured.

Q. That's all.

The Court: Will you have any redirect of any length, counsel?

(Testimony of Elaine Patterson.)

Mr. Hermann: None of any length. Possibly only one or two questions.

The Court: We could take a recess, but do you have any questions?

Mr. Hermann: I believe I have none at all.

(There were no further questions and the witness was excused from the stand.) [371]

(Thereupon at approximately 4:15 p.m. court recessed for ten minutes, the jury being duly admonished.)

After Recess

(Both counsel stipulated as to the presence of the jury, and all other necessary persons being again present, the trial of the cause was resumed.)

The Court: Very well. We may proceed.

CHARLES MILLS

is then called and sworn as the next witness for the plaintiff, and then testified as follows:

Direct Examination

Q. (By Mr. Hermann): Mr. Mills, would you tell the Judge and jury your name.

A. Charles E. Mills.

Q. What is your business or occupation at the present time?

A. I operate the Nome Pool Hall.

Q. Do you know the defendant Steve Salinas?

A. Yes sir.

Q. Have you ever at any time had any business

(Testimony of Charles Mills.)

dealings with Mr. Salinas? A. No sir.

Q. Have you ever at any time corresponded with him? A. Just one letter is all.

Q. When was that?

A. I don't know when it was; last month some-time.

Q. Would that be the month of March?

A. Yes, I guess so. [372]

Q. What was the letter in reference to?

A. Well I just asked him if he——

Q. Go ahead.

A. I just asked him if he would lease me the place he had over there or sell it on terms.

Q. Do you have a copy of that letter?

A. No.

Q. Did you receive any reply from that letter?

A. Yes.

Q. When did you receive the reply?

A. Well that was last month too, sometime. I don't know.

Q. Where is that reply now, do you know?

A. No. I guess it's in the garbage dump, I guess. I never keep those things. He wasn't interested in my proposition so I just threw the letter away.

Q. Could you tell us what the letter said?

Mr. Taylor: Just a moment. I am going to object, your Honor. It wouldn't be the best evidence, and it's incompetent, irrelevant and immaterial, a letter written in March of this year.

The Court: It's not too remote, counsel. Of course the witness may testify to the contents of

(Testimony of Charles Mills.)

the letter or document if it is shown that it is destroyed, and that is what I understood him to say. It is not the best evidence, but it may be done.

Mr. Taylor: Yes, your Honor, but coming after the fire, not before the fire? [373]

The Court: That is true, but it is not too remote. Three months is not too remote, I would say.

Q. (By Mr. Hermann): Would you tell us what—

Mr. Crane: If your Honor please. May I address your Honor. I would like to have the jury excused until we finish the contents of this letter. It may be highly prejudicial; if it is admissible then it can go to the jury.

The Court: Very well. The jury may retire to the jury room.

(The jury leaves the court room and retires to the jury room.)

The Court: Now perhaps we could have this offer of proof out of the presence of the jury. Would you state what you expect to prove.

Mr. Hermann: I expect to prove that Mr. Salinas offered to sell the Kotzebue Grill for the sum of \$10,000.00. I believe there was evidence from the expert to the amount of damage. In figuring the amount of damage, the figure of \$10,000.00 would relate back to the value of the building before the time of the fire.

The Court: Somebody, Mr. Harkabus, I believe, did testify as to the estimate of loss. What was it?

Mr. Hermann: It was between \$2,000.00 and

(Testimony of Charles Mills.)

\$2,500.00 damage. So I believe it would relate then, though subsequent in time, to the value defendant placed on it.

Mr. Taylor: If your Honor please, I do not believe that this [374] offer at this time would be of any value, any evidence of value. The business is necessarily deteriorated over the period since it was hurt. Furthermore this defendant has been out of business since the loss. He went outside to Seattle on an income tax case which cost some \$16,000.00.

The Court: There is no evidence of that sir.

Mr. Taylor: There is no evidence of that but this is an offer of proof, and we will prove this, your Honor.

The Court: Counsel, circumstances such as you just mentioned may be offered in rebuttal or even on cross examination, if known with reference to the fact that the business has since been closed; The amount of actual damage—those factors which may be considered. But does that destroy the fact that testimony may be offered? If it is a declaration by the defendant himself in which he places a value on this property, it is not too remote from the fire.

Mr. Taylor: I am going to contend that it is too remote. A forced sale and a person——

The Court: A forced sale? I heard no such suggestion, counsel.

Mr. Taylor: We asked to excuse the jury so we could show just what we could expect to prove.

(Testimony of Charles Mills.)

The Court: What you expected to prove by this witness.

Mr. Taylor: Yes, but which we would also expect to be shown in rebuttal was a compromise.

The Court: Now, counsel, you surely do not contend that we may not admit this because you may not rebut? [375]

Mr. Taylor: I don't think we would have to rebut it.

The Court: Why is it not admissible three or four months after? According to your argument, counsel, the Court should reject this testimony because you can rebut it. Is that a valid argument, or reason?

Mr. Taylor: The letter would be the best evidence.

The Court: We have already talked about that. Call in the jury. The objection will be overruled.

(The jury returns to the jury box.)

The Court: The witness was asked to state to the best of his recollection the contents of the letter received from Steve Salinas. You may answer that as far as you can remember, Mr. Mills.

A. It was very short and brief. He wouldn't care to lease or sell on terms.

Q. (By Mr. Hermann): What else, if anything, did he say?

A. Didn't say anything else. Just signed his name.

Q. Was any figure mentioned?

A. No sir.

(Testimony of Charles Mills.)

Mr. Crane: We object, your Honor. It's leading and suggestive. He said it was very brief. He already answered the question, your Honor. He said he wasn't interested in leasing or selling.

The Court: I fear the question may be leading. Objection sustained. You may ask him again to the best of his recollection [376] whether there was anything else in the letter, but you must not suggest the answer.

Q. (By Mr. Hermann): Was there anything else in the letter, Mr. Mills?

A. Nothing else.

Q. Did you ever receive any other letters from Mr. Salinas? A. Never.

Q. No further questions.

Mr. Taylor: No questions.

(There were no further questions and the witness was excused from the stand.)

Mr. Hermann: At this time I would like to introduce an official document.

(A document is shown to defense counsel.)

Mr. Crane: If your Honor please, we will have to take a little time to examine this because I think I have some other papers in my file that pertain to this. Either I have them or Mr. Salinas has them, because they were shown to me last evening.

(After a short interval.)

The Court: Have you examined it counsel? If you are finished with it, I would like to see it because I have no idea what it is all about.

(The document is handed to the Court.)

(Counsel approach the bench out of hearing of the jury and the reporter.) [377]

The Court: Well, we had best excuse the jury again while we discuss the admissibility of this. Will you please retire again. I am sorry, ladies and gentlemen.

(The jury again retires to the jury room.)

The Court: What is offered here apparently is a certified copy of a notice of tax lien under the Internal Revenue laws, filed December 5, 1957. The instrument seems to be properly certified by the United States Commissioner for the Noatak-Kobuk Precinct and bears also the certificate of the Clerk of this Court certifying that Alfred G. Francis is the recorder for such precinct. So it may be admissible under our statute so far as its authenticity is concerned. But the question which bothers me is as to its relevancy. I presume you are offering it to show that the defendant on December 5 was in trouble financially on account of the tax lien and therefore to show motive. Is that it? I am asking Mr. Hermann first.

Mr. Hermann: Yes sir. This is the first day I didn't bring my books down—but I have found a case where evidence of taxes and other cases where evidence of financial difficulty has been allowed to be shown to show motive for intent for the crime of arson.

The Court: Now then, Mr. Crane?

Mr. Crane: If your Honor please—

Mr. Hermann: I would also like to point out

that it relates very closely in point of time.

Mr. Crane: In answer to the last statement, point of time, this [378] is a lien filed in Texas, down there after he was down there. It was filed in Texas, I believe in the District at Austin.

The Court: It was filed in Kotzebue. Well, I believe it issued out of the Texas office, did it not?

Mr. Hermann: I believe they sent it up here.

The Court: It is out of the Texas office; but what difference does that make?

Mr. Crane: If the Court will indulge me just a minute, I take the position that it is highly prejudicial, first, for this reason; I have, either in my file or in my office, at least I did have the night before last, a release of this particular lien in question prior to the fire. The release came in a few days ago. This has only been settled very recently and if we have to go into this and show the circumstances surrounding it, the releasing of this lien, it is going to take some time to show how we did clean this lien up. But the lien has been satisfied.

The Court: That's the very thing the Government wishes to show, motive, financial difficulties existing at the time of the fire. This was the fifth of December, which is 20 days prior to the fire. Rather a substantial amount, over \$7,000.00.

Mr. Crane: He hasn't collected any insurance to pay it though. He hasn't even claimed any insurance.

The Court: Well a satisfaction of lien just recently through borrowed money or something——

Mr. Crane: I don't know how recently. I only received it, the [379] satisfaction, a few days ago. It was mailed to Mr. Salinas and forwarded to him and then forwarded down here, in my care. I can't state to the Court the exact date of the satisfaction of lien until I examine it. It would naturally take me a few minutes to put my hands on it. I thought I had it in my file in court.

The Court: Well, if it was not satisfied on December 25 I cannot see what difference it would make for the purpose for which the exhibit was offered. It is purely a circumstance and if it is valid the fact that it is prejudicial does not render it the less so. All evidence against a suspect is prejudicial. My duty is to determine whether it is legal.

Mr. Taylor: I take it then that the Court's ruling—

The Court: I haven't ruled on it yet. I am thinking I would like to see that case. Such a decision would be helpful.

Mr. Hermann: It would take me but a minute to look it up, at the most.

The Court: I would prefer to have such authority. As I say it sounds quite logical. Do you have any other witnesses?

Mr. Hermann: I hadn't planned on any more. I have to make one last minute check. But I don't believe at this time there will be any further witnesses.

The Court: You intend to rest after this?

Mr. Hermann: I believe so.

The Court: Well how long would it take you to find that case?

Mr. Hermann: It's in the book sitting on my desk, and I have [380] a bookmark in it I believe.

The Court: Well, if you expect to rest, at this time suppose we take a recess for five minutes while you procure this. I am inclined to believe that you are correct but I should like to be sure.

(The jury having previously retired, court recessed for approximately five minutes at 4:45.)

After Recess

(All persons required to be present were again present.)

The Court: The record may show the jury is still absent. I am cited upon this offer of a tax lien to a text, a treatise on the law of arson by Arthur F. Curtis of the New York Bar, which is not very new, but yet the law of arson is also quite old. In this it is stated in connection with proof of insurance, and bearing upon the defendant's motive in an arson case, that the state may prove evidence of financial condition, that evidence of financial condition is competent. Thus the prosecution can show at the time the bank account of the accused was small, that he had various checks returned unpaid, or also that the defendant was delinquent in payment of taxes or rent may be disclosed. It goes on to other demands of creditors that may be shown. That seems to be in accord with the general rule which I had noted previously in discussion of the

law of arson in 4 Am. Jur. that the existence of motive, [381] although not necessary to be shown in arson cases, is competent to be shown. And that, surely, is the law. Therefore, I think that the position of the United States Attorney is correct, and that this exhibit may be received as bearing upon the matter of intent or motive. It has not yet been offered, but if you will call in the jury it may be offered in the regular course.

(The jury then returns to the jury box.)

Mr. Hermann: If your Honor please, I would like to offer in evidence an official document, recorded by the recorder for the Noatak-Kobuk Recording Precinct.

Mr. Taylor: To which we object, your Honor, and what we would like to do is reserve argument on this until tomorrow morning, your Honor, subject to Mr. Hermann's resting. If you would like to hold that until tomorrow I would like to bring some authorities in on this, on short notice.

The Court: Well, I have already ruled upon this out of the presence of the jury. I will tell you—it may be received but it may not be given to the jury at this time. And if you can convince me that I am wrong, I will reconsider the ruling made a few moments ago.

Mr. Taylor: Yes, your Honor.

The Court: Very well. The exhibit may be received but may not now be read to the jury. [382]

(A certified copy of notice of tax lien is marked for identification and received in evidence as plaintiff's Exhibit Z.)

Mr. Hermann: But it may not yet be read?

The Court: No. We will hear from counsel further on this subject, if you wish, in the morning.

Mr. Hermann: If your Honor please, I would like to recall Mr. Mills to the stand. It won't take long.

CHARLES MILLS

is then recalled recalled to the witness stand, and having previously been sworn, testified as follows:

Q. (By Mr. Hermann): Mr. Mills, did you state whether or not you have talked to the defendant Steve Salinas since the time you mentioned that you received that letter from him?

Mr. Taylor: Just a minute, your Honor, we are going to object to the recall of a witness after he has already once been sworn and examined and excused, and then he comes back in here and he wants to recall him.

The Court: That is surely in the discretion of the Court, as you well know. The Government has not yet rested. He may answer.

A. Well now, I went to Kotzebue and I went up to his room and asked him for the key and gave it to me and I went and looked at the place and went. I [383] didn't say three words to him. I said "hello", "May I have your key", and when I took the key back I didn't even take it back to the man himself. I gave it to the man that helps Mr. Salinas around there.

Q. And have you seen Mr. Salinas since that occasion?

A. I just saw him around in town here.

(Testimony of Charles Mills.)

Q. Did you talk to him when you saw him in town?

A. When he was in the place he just said "hello", and I said "hello, Steven".

Q. Did he say anything to you?

A. No sir.

Q. Did he in any way mention the correspondence?

Mr. Crane: I object, your Honor. Leading and suggestive, and an attempt to cross examine his own witness.

The Court: The witness has answered "Did he say anything to you?" and he answered "No". Therefore, the witness is apparently adverse. However, and the Court is going to notice that, if a witness is adverse, counsel may inquire a little further. That is permitted.

Q. (By Mr. Hermann): Mr. Mills, when you talked to Mr. Salinas in town here, was there any mention made by either of you of a sale of the Kotzebue Grill? A. Not a word.

Q. Did he ever offer to sell the Grill to you?

Mr. Taylor: Just a minute, your Honor. I think the question has been asked and was answered. It's repetitious and I believe improper cross examination of his own witness. He hasn't been a hostile witness. He has just answered the questions he has been asked truthfully. [384] That doesn't make him a hostile witness, your Honor. We object to it.

The Court: I find the witness is adverse and he may therefore be subject, not to cross examination,

(Testimony of Charles Mills.)

—certainly not—but to more or less leading questions. You may answer that question.

A. Just the time I told you. In March I guess it was. He didn't offer it to me then. He said he had it for sale and I asked him what he would take for it.

Q. (By Mr. Hermann): What did he say?

A. He said he would take \$10,000.00.

Mr. Hermann: No further questions.

Q. Oh, just a moment——

Was that for the Grill only, Mr. Mills?

A. Yes sir, that is all.

Q. Now wait a minute. We had better clarify that. Tell us what you mean,—the Grill building or what?

A. I didn't say nothing about the Grill; I was talking about the whole property.

Q. What property?

A. I mean the place he has over there.

Q. What place is that?

A. Well, I don't even know what the name of it is.

Q. What kind of a building is it?

A. A restaurant and some rooms upstairs I think.

Q. No further questions. [385]

Cross Examination

Q. (By Mr. Crane): Where did this conversation take place?

A. Right in the pool hall here.

(Testimony of Charles Mills.)

Q. When?

A. Well, I don't know; sometime in March.

Q. Did you accept the offer?

A. Did I accept it?

Q. Yes.

A. Well no, because I didn't say anything; when I made the trip to Kotzebue I went over to look at it.

Q. What I am getting at, that offer was just for the building alone, not for the stock or merchandise?

A. I didn't have no use for the stock or anything else in there.

Mr. Crane: That's all.

The Court: Well, I guess that's all then.

A. O.K.

(There were no further questions and the witness was then excused.)

The Court: That concludes our session for the day. Do you wish to rest at this time?

Mr. Hermann: I would rather adjourn than rest at the present time.

The Court: Very well. We will resume this case in the morning.

(Thereupon the Court duly admonished the jury and the session and court were adjourned for the day.) [386]

Be It Remembered that at 10:00 a.m., on April 25, 1958, Court reconvened and the trial of this cause was resumed. All counsel and all other neces-

sary persons were again present; the defendant also being personally present. Both counsel stipulated as to the presence of the jury.

The Court: Thank you. The defendant also being present we can proceed with the case. However, there is an *Ex Parte* matter that is directed to my attention. I will ask the Clerk to enter a minute order calling a special term of the Court to be held at Gambell on St. Lawrence Island on June 5 at 2:00 p.m. and that notice be given accordingly. I do not think we need to specify the purpose, but if so, it will be for the purpose of a naturalization hearing.

We will proceed then, with the case of *United States vs. Salinas*. At adjournment last evening opportunity was given the defendant to be further heard on the admission by the plaintiff of plaintiff's Exhibit Z. Do you wish to urge that, Mr. Crane?

Mr. Crane: No, your Honor.

The Court: That the Court's ruling is correct. Well, good. The exhibit has already been received in evidence but if you wish it may be read to the jury.

Mr. Hermann: I would like to read it to the jury.

The Court: It is understood that this exhibit is admitted purely on the question of intent or motive.

(Plaintiff's Exhibit Z is then read in its entirety to the jury by Mr. Hermann.) [387]

(At the conclusion of the reading of Exhibit Z the Government rested its case.)

Mr. Taylor: If your Honor please, we would re-

quest at this time that the jury be excused for the purpose of making a motion out of the presence of the jury, and perhaps arguing the motion also.

The Court: Very well. The jury will please retire to the jury room. If we find the time required is extensive at all, then you may be excused, but I do not know at this time. If you will just please wait in the jury room.

(The jury then retires to the jury room.)

Mr. Taylor: If your Honor please, at this time we will move the Court for an order entering a judgment of acquittal in Count No. 1 of indictment in No. 1642, criminal. We also make a motion for judgment of acquittal of the crime charged in Count No. 2 of indictment in No. 1642. The grounds of both of these motions, your Honor, is that there is not sufficient evidence to prove the *res gestae* of the crime in either count; that there is a total failure of proof of the essential elements of Count 1 in that there is no evidence of any kind or nature, your Honor, to connect the defendant with the malicious, wilful setting of a fire to a dwelling house. Furthermore, your Honor, another ground is that the dwelling house, that there was no dwelling house, that it was a business house which for some time had not been a dwelling house.

On the grounds of Count 2, since there was no wilful setting of [388] a fire by this defendant there could be no intent to injure or defraud an insurer. We feel both motions, your Honor, should be granted upon the grounds stated.

We also, at this time, make another motion, that

at this time the Government be required to elect upon which count they are prosecuting the defendant.

The Court: I have, of course, anticipated both of these motions and thoroughly considered them. I do not think I need to hear from the United States Attorney on them.

With respect to the first motion to dismiss, or for judgment of acquittal on the ground of failure of proof, there does appear to be ample evidence at this to submit to the jury as to the *res gestae*, as to the crime of arson having been committed. There is evidence to connect the defendant with the crime. Now it is possible that there is doubt which may be resolved on that question, but I feel any such doubt should be resolved by the jury. The evidence, of course, is purely circumstantial, which is true in almost all arson cases. Seldom, if ever, is any person caught in the act of a wilful or malicious arson. I will not detail it here, but there is evidence with respect to motive, with respect to admissions made by the defendant, that the fire was set, although denying that he did so and seeking to imply that someone else had done it; as to his attitude at the time of the fire, as to which there was a conflict of evidence. Some witnesses said he helped not at all, some said that he did. All of those things I think are sufficient to [389] sustain a *prima facie* case, and therefore to go to the jury.

I would like to direct counsel's attention particularly to a decision of the Circuit Court of Appeals for the Ninth Circuit sustaining a ruling of

the court denying a similar motion in the case of *Zamora vs. United States*, 112 F. 2d 631. Of course any such motion must be determined upon the facts of each such case. But I believe the facts here established in this case are at least as sufficient as in the case cited, to justify the Court in submitting the case to the jury.

And also as to the second count, the crime of burning with intent to defraud, in the same manner counsel's attention is directed to a decision of the Circuit Court of Appeals for the Ninth Circuit in the case of *Peters vs. United States*, 97 F. 2d 500, likewise affirming a decision of the District Court for the First Division, holding the evidence sufficient under such charge.

Again I feel that the evidence here is equally sufficient to that in the cited case.

With respect to the dwelling house, the law is clearly established that a building may be a dwelling house, even though occupied for other purposes, if any room or rooms in the building are ordinarily occupied as living quarters, which is a dwelling. It has even been held that one room is enough. One case goes even further than that and holds that a jail is a dwelling house where the jailer resided in it, and similarly that a school is a dwelling house where a school teacher lived in a room in the building. So it cannot be [390] said merely because this building was occupied by the Kotzebue Grill as a restaurant that it could not be said to be a dwelling house within the meaning of the statute, where two rooms had been so occu-

pied. Now, again, the question has been raised as to whether or not such occupancy had been abandoned. Under our statute the fact of non-occupancy makes no difference, as counsel's attention was directed at the time of hearing of the motion on this point—I beg your pardon—on the ruling on the question of admissibility of evidence or relevancy of it. I feel that where the evidence on that point is conflicting, such question must be put to the jury. And as an authority for that statement I cite particularly 4 Am. Jur. on the subject of arson, Sec. 13, page 93. Under our statute in Alaska, however, a further question arises. Defendant is here accused by indictment in Count No. 1 of the crime of arson in the first degree, which relates to a dwelling. Now, originally, at common law, arson was limited to a dwelling. It has been extended by statute in most states, and also Alaska, to include the burning of other types of buildings. But under our statute, under Sec. 65-5-2, a burning of a building wilfully, maliciously, is defined as arson in the second degree. Now in any case where there are different degrees of a crime, and there is evidence, or conflicting evidence, it is the duty of the Court to submit to the jury the lesser offense, and I believe that should probably be done in this case; that the jury should be instructed that if they find that the property here involved was not a dwelling under the proper definition, which I will endeavor to give to the jury, they then may find the defendant [391] guilty of the lesser offense of arson in the second degree. Therefore the jury may determine that question.

With respect to the motion to elect, I have also given a good deal of consideration to that question. Evidently the motion depends on Rule 14, FRCP, which provides that the Court may grant relief from prejudicial joinder by severance or a motion to elect, where the Court finds that joinder of counts is prejudicial to the defendant. Now all of the authorities hold that this question is one in the discretion of the Court, and that that discretion exists if the facts alleged in each of several counts constitute different grades of the several offenses, which certainly is true here. Well, not precisely true. They are all related together in the statute, but strictly speaking the second charge does not charge arson, but is a related crime to arson, being a burning with intent to defraud the insurer; and also that such joinder is proper and that election may be refused in the discretion of the Court, where the count constitutes different crimes but relate to and form a part of the same transaction, and that definitely appears here. These two counts are so related that evidence as to the second must necessarily include evidence as to the first. Therefore it certainly is not prejudicial to the defendant to try to the jury both of such offenses rather than require the defendant to submit to separate trials on the same facts and the same evidence, which indeed then would be prejudicial. I would direct counsel's attention particularly to the case of *Finnegan vs. United States*, Circuit Court of the Eighth Circuit, 2004 F. 2d 105, in which the Court reviews this very [392] question

and holds that if the charges are of the same general character or belong to the same class, and where the evidence of one relates to the other, and the Court finds that they are joined in good faith, the Government should not be required to elect. And likewise the case of *Tinkoff vs. United States*, Circuit Court of Appeals, Seventh Circuit, 86 F. 2nd 868, in which the same question was reviewed in an arson case. No, I beg your pardon, it is not an arson case. But it is one in which the Court holds precisely as in the *Finnegan* case; where the offenses charged were of the same class and involved closely related subject matter and that the joinder is proper. Refusal of the Court to require an election was upheld. Similarly, and this I think is an arson case, the case of *Pointer vs. United States*, 15 U. S. 396. Other cases too, I have reviewed, but these are the most clearly in point.

Therefore, I find that it is necessary for the motion for judgment of acquittal as to both counts must be denied, and the motion to elect must likewise be denied.

You may call in the jury.

Mr. Taylor: If your Honor please, we would like to argue this. We have done quite a bit of research, quite a bit of work——

The Court: I thought you had finished. I am sorry—I thought you had finished, Mr. Taylor. You did not indicate you wished to be heard further.

Mr. Taylor: I have prepared a brief.

The Court: When you took your seat I assumed you were finished. [393]

Mr. Taylor: I was not, Your Honor.

The Court: Very well. I will still hear from you, if you can show me where I am wrong.

(Mr. Taylor then presents further argument on the motions in question.)

The Court: I am satisfied that the evidence is sufficient to establish this building as a dwelling house. I am wholly satisfied and so hold.

Mr. Taylor: The Court is holding, or the Court is going to put it up to the jury?

The Court: I am, so far as your motion is concerned, I am satisfied, so I will put the question to the jury, the question of abandonment.

Mr. Taylor: The question of whether it was a dwelling house?

The Court: No. The entire question is going to be put to the jury. I am satisfied that the proof is sufficient to go to the jury. You are asking me to dismiss it because it is not sufficient, but I find that it is.

Mr. Taylor: Well, if there is a doubt that it is going—I would——

The Court: I have no doubt, not the slightest doubt, not a bit.

Mr. Taylor: Well, if the Court has made up its mind there is no use me wasting the time of the Court or counsel or the jury.

The Court: With respect to the dwelling house, I have not the slightest doubt that the evidence is sufficient. That question [394] will, however, be put to the jury in the same manner with respect to the other necessary allegations. I did not mean

to be heard to say that I have doubt. I said if there is a doubt that must be resolved by the jury.

You may call in the jury. We will then proceed with the testimony. If the defendant intends to produce evidence it is necessary that he make a statement at this time.

(Mr. Taylor then makes an opening statement on behalf of the defendant.)

(At the conclusion of Mr. Taylor's statement, approximately 10:50, a ten minute recess was taken, the jury being first duly admonished.)

After recess

(At 11:00 a.m. court reconvened and the trial of the cause was resumed. Both counsel stipulated to the presence of the jury and all other necessary persons were again present.)

Mr. Crane: I would like to have this marked for identification.

Mr. Hermann: I would like to see it.

(A document was handed to Mr. Hermann.)

Mr. Crane: It is an official communication which has not yet been recorded or filed, but I think the Court can take judicial notice. It is an official document, communication.

The Court: Communication or document?

Mr. Hermann: If Your Honor please, I do not believe it is properly certified as an official communication, and I do not [395] believe it is relevant because of the dates included on it, the date of execution.

Mr. Crane: It pertains, Your Honor, directly to

evidence that was introduced by the Government, that was introduced this morning. In fact it is almost so closely connected that it would be considered a part of the same, the same transaction. And I believe it has the same signature.

The Court: What have you to say as to relevancy on account of the date, the 14th of February, 1958?

Mr. Crane: It releases the document that was put into evidence.

The Court: Yes. That document was introduced to show motive prior to the fire and had no other purpose. This is considerably afterwards.

Mr. Crane: Quite true. And the original document was introduced for the purpose of motive. Yet, on the other hand, all such documents would be somewhat prejudicial, and this would remove that, and we believe we have a right to put this document in to explain the other. We believe it really should be a part of it.

The Court: I think you are correct. You may put this in by way of explanation of the Government's proof. The relevancy of it will be for the jury then.

Mr. Hermann: Still the matter does not contain an official seal through which it could be admitted as an original record.

The Court: This appears to be a signed certificate of the Internal Revenue Service. It bears a notation of the regulations [396] under which it was issued. That the certificate have an official seal is not essential to the validity of this document.

Mr. Hermann: On the basis of an official document or record, there could be no introducing it without a witness as an official document.

The Court: I do not think that, as long as the instrument has apparently not been recorded, the official certificate of the recorder could be required. No seal is required. It does bear or purport to bear the signature of a Group Supervisor in charge for the District Director of Internal Revenue. I think in fairness to the accused the exhibit should be received in evidence.

Mr. Hermann: Very well, Your Honor.

(Document entitled Release of Tax Lien is marked for identification and received in evidence as Defendant's Exhibit No. 10.)

Mr. Crane: I would like to read this to the jury.

The Court: Very well.

(Defendant's Exhibit No. 10 is then read in its entirety to the jury by Mr. Crane.)

ARCHIE ADIRIM

is called as the first witness for the defense and having previously been sworn, testifies as follows:

Direct Examination

Q. (By Mr. Crane): Mr. Adirim, you have already stated your name and official position to the jury. I am going to ask you if you know who was in charge of the Steve Salinas restaurant or place known as the Kotzebue Grill from the night of the fire until the time that you made your investigation and picked up the exhibits?

(Testimony of Archie Adirim.)

A. At the time we picked up the exhibits Joe Brantley was in charge.

Q. The exhibits were secured by you and Mr. Harkabus and Mr. Oliver approximately five days after the fire, is that correct?

A. I believe some of them were picked up on the 27th and some on the 30th.

Q. Some on the 30th? A. Yes.

Q. In your course of investigating the fire at Kotzebue, did, in your official capacity, make inquiry from the Wien Alaska Airlines and from Alaska Airlines for a list or the names of incoming passengers for a period of ten or fifteen days prior to Christmas day?

A. Not that I recall.

Q. Do you know of your own knowledge whether I made such inquiry of them, or was it discussed with you?

A. Well, I understand you did, of one airlines.

Q. Do you know whether or not I was furnished that information? A. No, I don't know.

(There were no further questions from either counsel and the witness was excused from the stand.) [398]

ROBERT W. OLIVER

was then called and sworn as the next witness for the defense, and thereafter testified as follows:

Direct Examination

Q. (By Mr. Crane): Would you state your name, please, Mr. Oliver?

(Testimony of Robert W. Oliver.)

A. Robert W. Oliver.

Q. I will ask you to state your official position.

A. United States Marshal for the Second Division.

Q. Are you acquainted with the defendant in the case now on trial? A. Yes sir.

Q. I will ask you if, on or about the 28th day of March, 1958, if you received from me——

Mr. Hermann: I object, if the Court please, to the form of the question as a leading question.

The Court: Which he hasn't yet completed. I really don't know. Will you finish it counsel.

Mr. Crane: I will change the form of it.

Q. (By Mr. Crane): Did you, on or about the 28th of March, 1958, receive a letter signed by Fred D. Crane of counsel for the defendant Steve Salinas, requesting and demanding that the defendant Steve Salinas be given a lie detector test?

A. Yes, I received a letter, and that was included in the letter. I don't recall the exact date of the letter.

Q. To your knowledge was any such test given Mr. Salinas?

A. Not to my knowledge, no sir. [399]

Cross Examination

Q. (By Mr. Hermann): Mr. Oliver, was an answer made to that letter that you received from Mr. Crane? A. Yes sir.

Q. Do you have a copy of that answer?

A. I do. It's in my office.

(Testimony of Robert W. Oliver.)

Mr. Hermann: I would like for him to furnish it. However, it is purely—such has never been allowed in court.

Mr. Crane: If Your Honor please—

The Court: That is, evidence based upon a lie detector?

Mr. Hermann: Yes, Your Honor. It has universally been withheld.

The Court: I rather think that is true. I think the courts have found thus far that such has not been established as sufficiently correct.

Mr. Taylor: In this case with permission of the defendant and if accepted, it would be by stipulation of counsel for the defendant. That would certainly make it admissible.

Mr. Hermann: Well, if they—

The Court: If it would be admissible with the consent of the defendant.

Mr. Hermann: I want it clearly established that they are introducing the evidence regarding the lie detector. (To witness), would you please get Mr. Crane's letter and the answer.

(The witness leaves the stand.) [400]

Q. (By Mr. Hermann): Would you please identify those documents, Mr. Oliver.

A. This is a letter from Fred D. Crane addressed to me in my official capacity and dated the 25th day of March; and this is a reply addressed to Mr. Fred Crane with a carbon copy sent to Mr. Salinas, and this letter is dated the 31st day of March. These were sent certified mail and I had a return receipt showing that Mr. Crane received

(Testimony of Robert W. Oliver.)

it, the letter, and that Mr. Salinas received the copy of it.

Mr. Hermann: I would like to have this marked.

Mr. Crane: I have no objection to its being received in evidence.

Mr. Hermann: We hereby offer it in evidence.

Mr. Crane: That is, my letter, and the answer.

Mr. Hermann: I would like to inquire whether counsel has any objection to any particular part of the communications at this time?

Mr. Crane: Not so far as I know.

(Letter to Mr. Oliver from Mr. Crane dated March 25; and letter (carbon copy) to Mr. Crane from Mr. Oliver and Mr. Hermann dated March 31 are admitted as plaintiff's Exhibit AA.)

Mr. Hermann: I would like at this time to read them to the jury, starting with the letter from Mr. Crane to Mr. Oliver.

The Court: Very well. [401]

(Plaintiff's Exhibit AA is then read in its entirety to the jury by Mr. Hermann.)

Q. (By Mr. Hermann): Now Mr. Oliver, was any acceptance ever made in regard to the offer of Sodium Amytal or Sodium Pantothol tests?

A. No sir. I never talked to the defendant; I talked to his attorney briefly on the subject in my office one day.

Q. Have they ever discussed further the possibility of taking a lie detector test?

A. Well, at the time of the discussion there I

(Testimony of Robert W. Oliver.)

understood that they wanted no part of any of the tests.

Q. Have they ever sent you the results of any such test?

A. No sir. It came to my knowledge that Mr. Salinas was in Anchorage, and I don't know whether he contacted the Territorial Police or not there. I didn't check. But he never sent me a copy and I have never received any word indicating that he did take such a test or any other kind.

Q. Has he ever bothered to discuss the case with you at all? A. No sir.

Q. Ever come forward and offered to make a statement?

A. No sir, neither the defendant nor his attorneys.

(There were no further questions and the witness was then excused.)

E. J. McKENNY

is then sworn as the next witness for the defense and thereafter testified as follows: [402]

Direct Examination

Q. (By Mr. Taylor): Would you please state your name? A. E. J. McKenny.

Q. Where do you reside? A. In Nome.

Q. How long have you lived in Nome?

A. Probably a year and a half.

Q. What is your occupation, Mr. McKenny?

A. I am a electrician.

(Testimony of E. J. McKenny.)

Q. How long have you been following that business or profession?

A. Probably 30 years.

Q. Where did you receive your training in electric work?

A. I served an apprenticeship in St. Louis, Missouri with the Union Electric Missouri Valley Co. and that apprenticeship lasted a little more than four years.

Q. After you had finished your apprenticeship what type of work did you follow? What particular type of electrical work?

A. Well, I followed the usual procedure. I went to work on the ground and line crews for the City of St. Louis, progressed through the ranks over a period of probably, well, I would say three to four years, in various positions as they came up on the seniority list and then became a journeyman line-man, and then did journeyman (narrowbacking) which is, in the trade, a term for inside electrical work, and I followed that more or less since that time, but sometimes I have done line work.

Q. Have you done any scholastic work? Have you studied the principles of electricity?

A. I have, as an apprentice, when serving my apprenticeship and also at [403] various trade schools in the Navy. I have a diploma from a couple of Navy schools which, of course, probably aren't too high a standard. Nevertheless they are what we had. And I have also taught in service schools.

(Testimony of E. J. McKenny.)

Q. Do those studies include the principles of electricity? A. Certainly does.

Q. This inside work you say, was that in connection with the wiring of buildings of various types?

A. Most inside work, as a general rule, I have found to be the installation of conduit, Romax, BX cable, knob and tube work, and now plastic covered cable, in the installation of commercial induction wiring, and residential light and power and communication systems, sir.

Q. Have you held any official position in any cities or towns concerning electricity or electric planning or distribution lines?

A. Well, I don't exactly understand what you mean. If you mean official positions—of course in my connection with the Union I have worked for a number of cities off and on.

Mr. Hermann: If Your Honor please, the Government will stipulate that he is qualified as an electrician.

The Court: Very well.

Q. (By Mr. Taylor): Then you understand the principles of electricity as applied to a distribution system in a building? A. Yes, I do.

Q. Mr. McKenny, in your work as an inside electrician have you had occasion to use BX in wiring a building? [404]

A. I have, sir. BX cable is not in vogue in the field. The fact of the matter is, that while it hasn't been outlawed by the Standard Electrical Code, it

(Testimony of E. J. McKenny.)

has been outlawed in most cities and I haven't had occasion to use BX cable in the last, probably, seven or eight years. But I have used it before that time.

Q. Do you know the names of the cities that have outlawed BX? Name a few of them.

A. On the West Coast there is Los Angeles. Unless—I haven't been down there lately—I would say—lately perhaps, these things have been repealed. But to the best of my knowledge Los Angeles will not even permit it in the city let alone be used. They won't let you put it in any kind of an installation. San Francisco is rough on it. I believe there are a few areas there where you can use it, away from the city. In the State of Washington the City of Seattle doesn't permit it, with a few exceptions, and possibly they have been eliminated. The City of Tacoma will not permit it at all.

Mr. Hermann: If Your Honor please, the Government will stipulate that BX cable is presently considered not of a safe type to use.

The Court: Very well.

Q. (By Mr. Taylor): Now, Mr. McKenny, can you tell the Court and jury, if you know, why BX is frowned upon by these cities and by electricians in general?

A. Well, BX—if you are not familiar with it—BX usually contains two or more conduit and it is necessary that it contain for each one a conductor or carrying wire. That cable is surrounded, or the conductor surrounded or shielded by a metallic

(Testimony of E. J. McKenny.)

shield. This metallic shield usually [405] has been cut in the past by an electrician with a hacksaw, and in cutting the cable oftentimes you injure the conduit, or the conductor. I believe the Code still requires that where you do use it you put in a ground wire as a safeguard, but of course oftentimes there is laxity in putting that wire in there and it will get in without it, and if you do not ground a BX thoroughly it then becomes a fire hazard. It's entirely possible. Anyway, those are some of the reasons why BX should not be used. There are very many more. For instance, a person can drive a nail in it quite easily and it would be a very difficult thing to find, and would be quite a fire hazard when it does happen.

Q. Now this danger then consists of what might happen to a building, to endanger a building. What is that? Are you familiar with shorts?

A. Yes.

Q. What is a short in electrical terms?

A. A short is a name for a condition that exists in a circuit that precludes the proper travel in the proper path of current. In other words your current doesn't usually go out and do the things it should do, light your lamp. But rather it starts to travel to the ground and return. As a result you generally have a blown fuse, sometimes a fire.

Q. Are you familiar with the principle of the generation of heat, electric heat by induction?

A. Yes sir, I am. That is a well-known industrial principle.

(Testimony of E. J. McKenny.)

Q. Would you explain to the jury what that principle is and especially as to how it would be applicable to the use of BX cable.

A. Well, that is one of the reasons why we do not like to use BX cable, because inductive heat going through is a very powerful type of heat, which applies in the industrial, commercial field and also in the medical field. [406] We find that—would it be permissible to look at that piece of cable there?

Q. Mr. McKenny, I hand you Exhibit L. You might use it to illustrate to the jury if you wish.

A. Now you see here (indicating), you have two conductors in this shield, I spoke of, which shields a heating element; under certain conditions it will short, and this is very possible if you do not have what we call a solid neutral, in other words a neutral from the ground up.

Q. Would you explain what you mean by a neutral.

A. Well usually in the circuit you have two or more wires, one called the hot side and one called the neutral side. The hot side usually comes out from the generator or comes out from the source that generates the power and goes through the neutral; performs the work going through the hot side and returns through the neutral. Now of course that isn't exactly correct but to make it simple that is fairly accurate. Now if you have that neutral solidly grounded, not unfastened, then if anything happens, a fuse blows, it wouldn't be

(Testimony of E. J. McKenny.)

along the hot side and there can be no danger. Your current, of course, is cut off and dead. But if you run into a haywire job, and I have wired many jobs where conditions were not in our favor, you have to guess—I have run into cases where you have to guess where your neutral is. If you, yourself put it in, you know where it is grounded. Even then sometimes it will break. A lot of the time the neutral will look perfectly o.k. but isn't, and may be broken somewhere. When your neutral breaks your current, of course, cannot return through the neutral and will probably go to ground through another source, another path, perhaps a water pipe or another wire or something like that. In short, you have a current going through this [407] conductor, through this conductor here (indicating on the exhibit); it goes on through this path here, and if this conductor and this outer shield are not grounded then you run into this principle of inductive heating that we spoke of awhile ago. This outer shield will become red hot and if hot long enough, depending of course on your current going through the line, will even melt and a number of fires have started as a result. The fact of the matter is that many fire investigators, underwriters, will tell you this is one of the greater hazards in electricity and explains why we have tried to get this outlawed for so many years.

Q. Would you examine that exhibit—I forget the number of it—

A. Exhibit L.

(Testimony of E. J. McKenny.)

Q. —and I will ask you to examine that and state, if you can, whether in your opinion that exhibit has been exposed to, would you say, considerable heat? Whether it has been exposed to considerable heat?

A. It has been exposed to a lot more heat than would be safe, I would say I don't know what you mean by considerable, but certainly more heat than it should have been exposed to.

Q. What causes you to have that opinion, Mr. McKenny?

A. Well, the general physical appearance, the remainder of the insulation here, that has a tendency to disintegrate in the course of handling; and also you see the discolored area along here (indicating), you see where—. It is not ash particularly, but the residue of combustion or at least evidence of it.

Q. Is that soot and char, is that from heat inside of that cable, Mr. McKenny? [408]

A. Well, of course I imagine it would take a laboratory test to determine that, and scientific apparatus, but it has all the appearance of having heated from the inside to a great degree, or at least it does to me. In other words, it appears as if the heat was generated on the inside rather than the outside. See here (indicating)—the coal tar content of the insulation has boiled from the inside out. If it had originated from the outside the insulation would be burned off.

Q. Do you say that by reason of the appearance of the BX in this particular instance?

(Testimony of E. J. McKenny.)

A. The general appearance of it and the appearance is what I can see. I didn't pull the conduit out. Would that be permissible. If we could pull it out to examine it perhaps the appearance could tell a little bit more, if we were granted permission to pull it out.

A. I do not have the power to grant such permission. I think that would be up to the Court.

The Court: If you request it such permission may be granted.

Mr. Taylor: I would ask permission.

The Court: Very well.

A. Well, we will see, if you want to see what it looks like inside. Now if this has been burned from the inside it usually—it's pretty hard to get out—(the witness is manipulating the exhibit), but we will see what we can do with it. Well—there goes your insulation. That, to me, looks as if it were burned from the inside because, as I said, here is evidence of the coal tar components of the insulation here on the outside, and if the heat had been from the outside, it probably would not be present.

Mr. Taylor: If Your Honor please, I would like to see that this (indicating), doesn't become disattached from the exhibit.

Q. (By Mr. Taylor): Now, Mr. McKenny, I will just ask you, from your examination of those conductors inside of the BX, can you state whether or not the insulation has been burned off of those wires? A. Sure: There it is.

(Testimony of E. J. McKenny.)

Q. Is there any insulation on those wires now?

A. Not that I can see.

Q. When those wires were put into that piece of BX would they, would that have been insulated wires?

A. Well, sir, if they weren't the cable would serve no purpose at all. It would be a dead short, absolutely. Absolutely useless. I couldn't say about that one, of course, because I just saw it, but if it wasn't insulated it would be a useless piece of material.

Q. From your experience as an electrician what degree of heat would be generated which would be sufficient which would burn the insulation off of those wires?

A. Well, that's something—I don't believe I ever had that question put to me, but a fairly high heat. Judging from lead, the fact that it is somewhere around 450 degrees, it would have to be a little bit higher than that. I would guess 600 degrees perhaps; I don't know.

Q. Do you know what the fusing point or melting point of tin is?

A. Tin I believe is in the neighborhood of 600 or 650 degrees. Now I couldn't say for sure on that, but that's my estimate as I recall. [410]

Q. Do you have any charts in your possession that would show that?

A. No. We usually use the electric code. The electric code usually has that in the back of it, or Westinghouse or General Electric handbook or such

(Testimony of E. J. McKenny.)

as that, but I don't have one in my possession.

Q. I believe—I had this in my pocket. Could you say whether or not that book contains the melting point or the fusing point of the various minerals? A. This particular book here?

Q. Yes sir.

A. I don't know. I would have to look at it and see. It's the usual Westinghouse pocket book that is given out as a little advertisement and the boys usually carry it to familiarize themselves with information that may have been forgotten.

(The witness looks through a little book.)

Mr. Taylor: I would just like for the present, Your Honor, for Mr. McKenny to refresh his memory as to the fusing point of at least two metals.

The Court: By using the book?

Mr. Taylor: Yes sir.

The Court: Well if the use of the book would refresh your memory (to witness), you may use it. You say the book is put out by Westinghouse for electricians and generally used by them?

A. Yes sir. In the course of a day you may use it many times.

The Court: You may use it if it would refresh your memory on the question. [411]

Q. (By Mr. Taylor): Is there a table?

A. There is. There is a table here that gives the property of metals. I see one column of material, one of liquids and one of metals and other materials. And in the metal column there is aluminum and so forth. There is lead, and down here is tin.

(Testimony of E. J. McKenny.)

Q. What is the fusing point or melting point of tin?

A. The melting point of tin is 450 degrees fahrenheit.

Q. What is the fusing point or melting point of lead? A. 621 degrees fahrenheit.

Q. Would that chart there show what the fusing point or melting point of commercial solder would be?

A. I don't know. No, it does not, that I can find.

Q. What are the components used in making solder, Mr. McKenny, if you know?

A. Well, there are several different grades of solder which have been used. Solder, as the standard in the profession usually referred to, is usually referred to as 50/50. That isn't exactly what it is, but it's roughly 50% lead and 50% tin, and anti-mony and perhaps some other agents are in there in slight degrees. But it could be also by as much as 80/20, 80% lead and 20% tin and on down to a reversal of that.

Q. What is customarily used in connection with wires on inside wiring?

A. Well, I have always followed the practice of using 50/50, half tin and half lead, which is usually available in practically every market, and I believe that is customarily specified for Government buildings which were [412] considered to be a standard.

Q. Now Mr. McKenny, I believe in your busi-

(Testimony of E. J. McKenny.)

ness, do you use soldering irons to quite an extent in soldering in connections?

A. Yes sir. We use soldering irons. However, most men prefer some type of torch, usually more practical to use.

Q. Both torches and soldering irons are used?

A. Yes sir.

Q. Now Mr. McKenny, I am going to call your attention to plaintiff's Exhibit I and plaintiff's Exhibit E and ask you if you can put those together in such a manner as to make them a workable instrument for soldering?

A. Apparently this goes in here (indicating), however there appears to be some components that are missing. I believe there's an insulator or two that isn't here. This heating element will go in the shell but I don't believe under the present conditions that it is placed correctly. I think it sets down too far and there is no insulator there to keep these wires from shorting, so with just these materials here I couldn't make a soldering iron out of it.

Q. I might just call the jury's attention to this insulation that came out of that. Now maybe we won't get so dirty.

A. No, I couldn't make a workable rig out of that the way it is now, without a few more parts.

Q. Now there would be considerably more to this then to make a workable instrument?

A. It seems to me it needs another insulating bushing on there and some type of insulator or

(Testimony of E. J. McKenny.)

something to keep those wires apart there, as it sure won't work that way. [413]

Q. Now in looking at that exhibit, or those exhibits together, do you have any idea or opinion or knowledge as to what size, if these go by sizes, that this would be?

A. Well, I didn't read the data on there. However, if you would let me see it again, it's the only way I can tell you what size it is without putting a receiver or a meter or something like that on there. I would just have to read the label on there is the only way I could tell.

(The witness examines the exhibits.)

Well, that's a 55 watt iron intended for use on 115 volts, according to the data on there. Incidentally, I don't see any underwriters label on that thing so I don't know whether it is tested and approved or whether that data is correct. Usually we don't accept that stuff unless we have the underwriters labels because some of these people do put it over on us.

Q. Would you have an opinion as to what degree of heat would be generated by such a soldering iron as this if it was in workable shape?

A. Well, it would depend on how long you would leave it on and also on the voltage. If the voltage was low it wouldn't of course heat as quick. If it was high quite a high heat could be reached; ultimately it might even melt down. I have never seen one that did but I suppose it could if you left it on long enough, but there are a lot of factors involved in there.

(Testimony of E. J. McKenny.)

Q. Now, Mr. McKenny, I am going to ask you one more question—it's getting along toward lunch time—now assuming, that this exhibit L was found in an attic of a building and in which attic a fire had occurred, and that this exhibit was laying on sawdust insulation there, would you have any opinion as to whether or not this particular piece of BX could have been the cause of [414] igniting the sawdust in that attic?

A. Pardon me, did I understand you to say "could have been the cause of igniting" it?

Q. I asked you if you have an opinion as to whether or not it could have been the cause?

A. It could have been. In my opinion it could very well be. I said it could have been and that's partly by the fact, as you can plainly see, there has been excessive heat on this outside cable here, or the outside shield, and of course depending on the type of sawdust that you had surrounding it. Perhaps if the sawdust were a bit damp or something like that, perhaps it wouldn't. If it were ordinary sawdust, perhaps fir, douglas fir, pine or something like that with resin content of any size, I would say in my opinion it could very well start a fire.

Mr. Crane: If Your Honor please, I might have a few more questions for Mr. McKenny but I would ask that we take the noon recess at this time.

The Court: Very well. We will recess this case until two o'clock.

(Testimony of E. J. McKenny.)

(Thereupon the jury was duly admonished by the Court and the case recessed and court recessed.)

After Recess

(At 2:00 p.m. Court reconvened and all necessary persons being present, the trial of this cause was resumed. The witness on the stand at recess resumed [415] the stand for further direct examination. Both counsel stipulated as to the presence of the jury.)

Q. (By Mr. Taylor): Mr. McKenny, did you make any tests with a soldering iron and sawdust recently? A. Yes, I did.

Q. Why did you make that?

A. At the request of defense counsel I made an experiment sir.

Q. What was that experiment?

A. The results of the experiment or how it was done?

Q. What experiment did you make?

A. We secured a sack of sawdust, approximately three or four pounds I would say, of not especially high grade sawdust, just what you might call mill run; in other words I presume just grabbed up from the floor and thrown in the sack. In the sawdust were some splinters. The sawdust had the appearance to me of being from Douglas fir. It was quite dry and a little bit finer than the general type of sawdust you would generally expect to find as to appearance. Then I got a bread pan approximately a foot long and perhaps half as wide, and

(Testimony of E. J. McKenny.)

about three inches deep. Then I got a piece of very dry quarter-inch plywood, Douglas fir, placed it in the bottom of the bread pan, after which I put the sawdust in the pan on top of the plywood at an approximated depth of one and three-quarter inches, and I measured that distance with a rule. So I took a soldering iron, plugged it in to a source of current that should have been 120 volt, and was approximately 112 volts at the time, fed by a conductor comprised of two-wire, 12 Romex. We plugged that in, if I remember right, I [416] have forgotten now, about three o'clock, a few minutes after 3:00 p.m. that particular day and by——

Mr. Hermann: If Your Honor please, I object to any results of the test. It has not been shown that the factors involved in the test by Mr. McKenny in any way are similar to the ones involved in this case. It has never been shown whether the sawdust in the Kotzebue Grill was made out of fir. There is quite a difference between pine and fir. It has never been shown what kind of a soldering iron was used, whether it was the same kind, smaller or larger. It has never been shown whether it was two-wire No. 12 Romex or whatever the Romex mentioned was, whether it was the same type of cable. Also objected to that the kind of sawdust has not been shown as the same type of wood he is referring to. In other words, that the conditions of the test can in no way be related to anything material in this case.

(Testimony of E. J. McKenny.)

The Court: So far as the type of sawdust is concerned I think I understood from both the testimony of this witness and Mr. Harkabus that there is little, if any, difference. The other conditions have not quite been explained, counsel.

Mr. Taylor: I am prepared to meet those now.

Q. (By Mr. Taylor): Mr. McKenny, I will have you take a look at that soldering iron and then have you compare it with the remnants of a soldering iron which was introduced in evidence here as Exhibit E and Exhibit I and state, if you can the similarity or whether they are similar or identical.

A. This iron here (indicating), I couldn't read it when previously [417] presented to me, but I see this is No. 55 B, Soldermaster, apparently made by the H-e-x- something or other Corporation of Roselle Park, N. J. I presume that's New Jersey. That is, the iron is 55 watt, 115 volt. Then here (indicating), this is a Soldermaster iron, 55 watt, 115 volt, No. 55 B, made by apparently the H-e-x- or something or other, Inc. of Roselle Park in New Jersey, I presume. So they would be very, very similar, the same wattage and the same voltage.

Q. Would they not be identical?

A. Well, I couldn't say that they are identical, not honestly, because I would have to put a meter on them to test the resistance; if this element here is a component part of this shell. If it is.

Q. After putting the soldering iron in the sawdust, how deep did you bury it?

(Testimony of E. J. McKenny.)

A. I covered the iron. Now I did not bury it in the usual sense of the word, but I placed sawdust to the top of this part here (indicating), in the pan, to the top of it. I didn't put the thing to the top but to the point where it was stencilled on top, to which point we partially buried it.

Q. Did you then plug it in? A. Yes.

Q. How long did you allow that soldering iron which I have just exhibited to you to remain in that sawdust?

A. Two hours and thirty-five minutes sir.

Q. What was the result of that test after the soldering iron being in the sawdust for two hours and 35 minutes? A. The net result?

Q. Yes. What occurred? [418]

Mr. Hermann: I object on the grounds it has never been shown anywhere in this case that the test referred to is similar. There has been no indication that a soldering iron was buried in the sawdust or that it was sawdust which was first, in fact, ignited by the soldering iron.

The Court: Well, the facts we do know precisely are, that the evidence was, that the iron, or a portion of it, was found between the joists of the attic and that there was sawdust between the joists. It is impossible to tell precisely whether this experiment was conducted with the sawdust buried to the same extent or whether the iron in the attic was buried at all. But it strikes me, so far as can be shown by the evidence, that the experiment is sufficiently similar that the results may be shown. Now again, the weight of it is for the jury.

(Testimony of E. J. McKenny.)

Q. (By Mr. Taylor): Mr. McKenny, would you answer the question please.

A. We left the iron in there, as I said, for a period of two hours and thirty-five minutes.

The Court: Turned on?

A. Yes sir. Plugged in and turned on. At first, I would say with ten minutes—I didn't keep any notes on this experiment—I would say within ten minutes the sawdust began to smoke. After a period of an hour the sawdust had charred and receded from the iron a distance of about three-quarters of an inch, but the iron, the weight of the iron had caused it to fall down, you understand. That sawdust at no time burned but it charred and did smoke. [419]

Incidentally, I might add that we placed the bread pan on a table in an ordinary room. We made no effort to shut the draft off or give it any extra draft or anything like that. I thought I should conduct it in as fair a manner as possible to all concerned. At the end of about an hour and a half the room was getting so full of smoke from sawdust as to be uncomfortable, but there was still no indication of a blaze or anything like that. However, the sawdust was charred right along the iron. At the end of two hours and thirty-five minutes the sawdust had charred to the point where it had been reduced probably to ashes, to the point where the iron was on the plywood which formed the floor of the pan and had gotten charred; in fact it had charred along the floor, if I remember right, a place

(Testimony of E. J. McKenny.)

about a quarter-inch wide and about this distance (indicating), to the plugged section of the iron. At that time the place was so full of smoke I threw it out in the yard.

Q. (By Mr. Taylor): Was the current on at all times during that two hours and thirty-five minutes? A. All the time. Yes.

Q. And you say this test was conducted in a room where you had the normal amount of oxygen?

A. Yes. It was conducted in a room usually used for kitchen purposes.

Mr. Taylor: You may take the witness.

Cross Examination

Q. (By Mr. Hermann): Mr. McKenny, in the first part of your testimony you stated many—I believe you used the term “haywire”—that you had worked on many haywire jobs in Nome that included BX cable? [420]

A. Yes, there are many of them. There are quite a few “haywire” electric systems in the city of Nome.

Q. Have many of them ever been on fire as a result of them?

A. Mr. Herman, in my experience in Nome, I have found as a general rule that when we finally do get to a building with the fire equipment, it is usually in such shape it is beyond any possibility to tell what caused the fire, with two exceptions, the exception of two instances.

Q. Is it your general experience then that the

(Testimony of E. J. McKenny.)

cause of fire is hard to detect, whether it is the result of wiring or some other cause? Is that right?

A. As far as generalities is concerned, I couldn't go into generalities. The only thing, my experience has been it is very, very difficult to determine what caused the fires, with the exception of stove fires that we know of. As an example, we had a house burn—we have had two fires this winter and I don't know who would be qualified to tell you what caused them. However, in both of those, Larry Minnix's and John McNees', the wiring could very, very easily have been the cause of the fire. But I couldn't say for sure.

Q. There are many old houses with BX that have not burned, are there not? A. Yes.

Q. In Nome now?

A. Well, yes. I suppose there are a lot that haven't burned.

Q. They don't always burn, do they?

A. No. They don't always burn.

Q. Now I am handing you plaintiff's Exhibit L which consists of two inter-wrapped wires and a BX shield or cover. Now you testified, I believe, [421] that there was some charred insulation there?

A. There certainly was. Yes.

Q. Now would a wire in the condition it was before you took it out, if it were doused with water, what would be the result?

A. Well, there again, there are a lot of factors involved, Mr. Hermann. How hot was it when it was doused with water, for instance? Was it alive at the time?

(Testimony of E. J. McKenny.)

Q. Assuming it was alive at the time, what would be the probable result?

A. There probably would be steam arise from it.

Q. Would it be apt to short?

A. It could. It would depend on whether or not the insulation was charred. Possibly it could.

Q. If it was charred to the extent it was when you took it apart, would it be likely to short or what?

A. In the first place, a wire that was charred to the extent this was when I pulled it through probably would have no current in it, because it would have gone to ground and blown out the fuse by the time it got that hot, and so there wouldn't have been any current there.

Q. Let's assume this wire when you found it—let's assume this wire, before you took the insulation out, if they got immersed in water, then what?

A. If the current was on there, yes.

Q. Then you testified there is evidence of heat on here (indicating). Can you definitely state that is electric heat or is it possible it is another source of heat?

A. Mr. Hermann, that may have been electric heat there; it may have been [422] some other source of heat in there. I have no intention of engaging in argument with you, but if you will look here (indicating), you can see indications of these petroleum products that form the component parts of the insulation of the wire. Indication of it bubbling out. My contention is that if the heat were

(Testimony of E. J. McKenny.)

applied externally, as apparently has been done here on this end (indicating), then that would not be in evidence because that would have been burned off.

Q. Well, when something is heated, it expands.

A. That's a generally accepted rule of physics.

Q. Couldn't it be expanded by heat from an exterior source and force its way through?

A. Well, if the heat were from the outside it would burn both; there would be no residue on it.

Q. If it remained hot, it might remain on there, might it not? Do you think that's possible?

A. Well, I have never thought about that. It probably would be hot for awhile after the fire went out.

Q. Now you testified, I believe, that it will depend on whether or not there was a ground?

A. Yes. That is one of the important factors in determining heat by induction.

Q. Does this one have a ground with it?

A. There is, Mr. Hermann, supposed to be.

Q. There is a wire on the floor here now (indicating).

A. I imagine so. It looks like it, like the same thing. Probably is. [423]

Q. This wire?

A. But this wire (indicating on the exhibit), is usually used as the ground, and usually used for this very self-same purpose, to make this a continuous outer shell. That is why it is put in there. But, including myself, very few electricians are

(Testimony of E. J. McKenny.)

energetic enough to hook it up when we put it in. But if properly grounded it wouldn't heat the way it has been heating.

Q. You have no way of knowing whether that was hooked to a ground or not?

A. I never saw it before it came in here, but from the appearance it was not grounded.

Q. Is there any indication on the cable or wire of a short?

A. Well yes; there is indication of burning, of a short. But I can't say for certain. That is something you couldn't determine without certain circumstances, because the indications would be about the same for a short or for a one-line.

Q. Then you can't definitely say that this cable has, in fact, shorted, can you?

A. No I can't say definitely as a fact that that has shorted. It's my opinion it's probably an induction heat and not a short.

Q. Induction heat? A. Yes sir.

Q. But the reason—is it possible that it was from an exterior heat?

A. Yes. It is possible there is an exterior heat, but that is a rather odd looking piece of cable for it to be exterior heat. Its appearance is rather odd.

Q. Now if this cable were to receive a high degree of exterior heat, would it become less safe than it would otherwise? A. Certainly.

Q. Now I believe you gave the melting temperature of lead at 621 degrees. Is that correct?

A. I believe that's right. I don't try to remember, but that's approximately correct.

(Testimony of E. J. McKenny.)

Q. But should a soldering iron, to be efficient, be hotter than that, sir?

A. Just to tell the truth I have never put a thermometer on a soldering iron, but we usually heat them up until they heat the solder.

Q. You want to melt that solder, is that right?

A. Yes. It melts in a reasonable length of time.

Q. And to do that it would have to be hotter than the melting temperature of the tin or lead, would it not?

A. Mr. Hermann, in using solder we aren't concerned with the melting temperature of the element itself, but with the solder. There is a small pamphlet we use that gives the melting temperatures there. And if we have lead and tin it will bring it about half way in between. If an iron is not new we usually test it; if it's new at the time, it's generally hot enough when we try it out.

Q. Just a couple of questions, Mr. McKenny. About half way in between that would be roughly about 500 degrees? Would that be very close?

A. I would say somewhere along in there. I am just guessing.

Q. To have a finished soldering wouldn't you require it a great deal hotter?

A. Not a great deal because you then get too much of it, and that is no good. [425]

Q. Why not?

A. It is not necessary to melt your elements, just your solder.

Q. Not only has to melt it, but don't you re-

(Testimony of E. J. McKenny.)

quire that the soldering iron remain on for short periods to put it where you want to put it?

A. Yes, that's why we generally don't want to use a soldering iron.

Q. Then it's just necessary to have it some hotter than these melting temperatures?

A. Yes, some hotter.

Q. Is it desirable that it be several hundred degrees hotter?

A. If you heat it very much hotter than the code temperature then you haven't any solder; and under certain conditions, for instance getting acid on your plug, then there goes your iron. You don't want too much heat.

Q. Now if a soldering iron were left on indefinitely over a long period of time, does it become more apt to ignite things than it does otherwise? Is there relationship?

A. There certainly is. I would say yes.

Q. And a soldering iron left on all day would become hotter than one left on for four hours?

A. Yes, up to a certain point. Radiation would take care of it beyond that point probably.

Q. Now do you know what the ignition temperature of paper is? A. No, sir, I don't.

Q. Or gasoline?

A. Gasoline? No, I do not.

Q. Do you know to your own knowledge, whether a soldering iron would [426] ignite paper or gasoline?

A. In certain circumstances a soldering iron

(Testimony of E. J. McKenny.)

will ignite either, but I think I have never seen an experiment with gasoline. I think a man would be foolish to make such an experiment.

Q. You wouldn't recommend such an experiment would you?

A. No. Not to an average man.

Q. Now you were present in court during the course of the trial, I believe, were you not?

A. I have been in and out of court, yes.

Q. And you have heard the premises described of the Kotzebue Grill?

A. Mr. Hermann, I couldn't say, because I have heard people—you know—talking around town and I have a general idea of what the premises are like, but whether I got it in court or not I don't know.

Q. Have you been to such a place?

A. No, I never have.

Q. You have never inspected the place?

A. No. I don't know anything about the facts of the matter.

Q. You have no personal knowledge of Kotzebue, or the premises known as the Kotzebue Grill?

A. No, sir.

Q. Mr. McKenny, I am now holding Exhibit E, the casing of a soldering iron. Now you stated that this worked on the principle of induction?

A. I did not, knowingly.

Q. Now does the element heat the tip of the iron?

A. May I see that. [427]

(The exhibit is given to the witness.)

A. Mr. Hermann, this device here is a resistance

(Testimony of E. J. McKenny.)

device that probably is made of a metal known as nicron.

Q. Are you referring to just the top half or the whole?

A. I am referring to the whole iron, the whole element, if this is a soldering element, and I presume it is.

Q. This top part here (indicating), is that the same material?

A. No, this is not. This top here is insulated, and, as you will note, it has two holes down the middle, and the purpose of the two holes is to keep the wires separated so there will be no short circuit, and this here (indicating), is what we call the head as a general rule. Its composition—you see in there (indicating), is another conductor insulated with a ceramic product as a general rule, while this element here, as I said before, is probably built of what is known in the trade as Nicrom, in other words a metal comprised of nickel and chrome. I am referring to the heating element. This is the device you see meeting here (indicating), with the two little screws on the end of it. Now one of these wires goes down on here (indicating). You will observe—I presume you don't want me to destroy this?

Q. No.

A. One of these wires, no doubt, goes to here (indicating). I can only see one end here but I am sure this is probably what is called a wound element. In other words it probably goes in a

(Testimony of E. J. McKenny.)

spiral manner to here (indicating), and then it takes off up through here (indicating) in the middle, and this would be the other terminal of it, and that would be a type of resistance coil. [428]

Q. A resistance coil? A. Yes.

Q. How is the heat transmitted to the business end, the tip of the soldering iron?

A. By contact probably. I didn't operate that iron to see. I imagine by contact. That seems to be the usual way. And there should be in that——

Q. Is that what is called heat by induction?

A. No, sir, that is not induction. I believe that heating would generally be termed a radiation. I am not sure.

Q. Radiation? A. I believe so.

Q. Now over any given period of time, which would become hotter, the inside piece or the tip?

A. Well now, that, from a scientific standpoint, I couldn't say, but I imagine the element would get hot and transfer its heat to the copper tip. That is the principle on which a soldering iron works.

Q. This would heat up first and in turn heat the other (indicating)? Is that it?

A. That's right.

Q. And this (indicating) would probably get hotter, wouldn't it?

A. As I said before, I couldn't say from measuring with a thermometer, but my judgment is that it would.

Q. Now Mr. McKenny, I believe you stated that a shorted BX cable laid on sawdust could ignite it?

(Testimony of E. J. McKenny.)

A. Well, Mr. Hermann, please bear in mind that if there were a short it [429] would probably blow a fuse; but if there were induction it probably wouldn't blow a fuse because the load would remain the same. Now that's difficult to visualize perhaps. But that is why fuses are in the circuits.

Q. When you made that statement, are you assuming there was a coil created?

A. Well, it could set the sawdust on fire or other materials. It has done it.

Q. Well, is a coil of that type any hotter than a coil of this type (indicating)?

A. It depends there on a lot of factors, Mr. Hermann, again. Now a coil of that type with an amperage and a certain voltage would attain a melting point to melt metal. That, of my own knowledge, I can attest to because I have seen it, and particularly if you had a piece of, say, what we call No. 22 wire, then that would carry in the neighborhood of 35 or 40 amps., and that amount of current in there pushed along by about 120 volts would make a very good heating coil indeed.

Q. Would you say that either one of them could ignite the sawdust then?

A. Yes, sir, either one of them could do it.

Q. Either the element or the BX cable?

A. Yes, sir. A soldering iron undoubtedly could under proper conditions, if it had air, or oxygen could get to it; in time it would probably ignite the sawdust.

Q. Do you think it would make any difference,

(Testimony of E. J. McKenny.)

that is, if you know, would it make any difference whether the sawdust was completely covering the iron or whether the iron was on the surface of the sawdust? [430]

A. To be technical, no I do not; but I would think that if it were completely embedded there would be less chance of air getting to it so it would take a longer time bursting into flames. On the experiment I conducted it was just barely covered, so the air got to it.

Q. It might make a difference then as to how deep it got buried?

A. I can't say; but in my opinion if you can't get air to it, it doesn't look like it would ignite as fast, if it did ignite.

Q. Now in reference to this experiment you made, have you made any other experiments?

A. Along what line?

Q. Along this nature?

A. No, I didn't consider it necessary. Because I didn't have the exact sawdust I doubted very much the value of monkeying around with anything other than the exact sawdust in the exact circumstances. I couldn't go to Kotzebue and didn't feel too inclined to fool around with it. I understood that more experiments were being made in a more technical manner.

Q. Did you ever, at any time, experiment with just the element part without the iron?

A. No, I didn't experiment with the element part at all.

(Testimony of E. J. McKenny.)

Q. Could you state whether or not it is customary for a soldering iron to have a wooden handle?

A. Most of them have.

Q. Now if the handle is removed, would that have any effect on the inner parts? Would they be apt to fall out?

A. It would depend on the make of the iron, I imagine. The handle [431] usually holds the element in there.

Q. If the handle is off the element could be pulled out easily?

A. Let's see—I don't know—I never tried it.

Mr. Crane: If your Honor please, if both the witness and the Court will please bear in mind that we still have experiments to perform with that iron. Do not destroy it.

A. Well, I am not going to get that off apparently, so probably that holds the element in.

Q. (By Mr. Hermann): Now in this experiment you performed was there any gasoline or any other inflammable fluid placed in that sawdust?

A. Not in that experiment, no, sir.

Q. Was there any paper placed in the sawdust?

A. No, sir.

Q. Did you experiment with paper at all?

A. No, sir.

Q. Do you know whether or not the iron would have ignited the sawdust if paper was with it?

A. As far as that particular iron goes, that is the only time I performed any experiment with it,

(Testimony of E. J. McKenny.)

sir, but to my own knowledge other soldering irons have set paper afire.

Q. It's generally considered dangerous to leave a soldering iron on?

A. It depends on the circumstances.

Q. For a rather long period?

A. It still depends on the circumstances. [432]

Q. Now you mentioned that you used the regular Nome voltage to conduct the experiment. Do you know whether or not the voltage here is lower or higher than in Kotzebue?

A. Not to my knowledge. But in viewing some of the Rural Electric Association reports and so forth and so on, I find that their regular voltage is rated at 115 volts, and ours is rated at 115 volts. However, we don't have 115 volts, as you well know.

Q. Do you know whether Kotzebue has?

A. That I don't know. I don't know what their actual voltage is.

Q. Do you know whether or not they have a REA plant?

A. Well, the reports that I got, that I looked over, intimated that, or I intimated from them, the manager or managers, that they had a REA plant, and I presume they were accurate reports. But I have not been to Kotzebue except passing through and I couldn't say personally from my own knowledge.

Q. From the reports you would say they have?

A. From the financial reports I read, yes, sir.

(Testimony of E. J. McKenny.)

Q. You didn't, I imagine, check the exact voltage at the time of the experiment, did you?

A. No, I didn't check the exact voltage on the experiment we had, but I know what it is.

Q. About what is it?

A. At that particular point that voltage never reaches any more than 112 volts except on surges, and usually operates on a voltage of, say, around 108 volts, in that particular neighborhood.

Q. Then there could be a gap of ten or less volts between that and the standard REA line? [433]

A. Well, I am sorry—but as far as that goes I didn't check that voltage. It has been known to drop down in some neighborhoods to eighty some volts.

Q. Well that would affect the time it would take an iron to heat, would it not? A. Certainly.

Q. You stated that on this exhibit, the soldering iron, it is not indicated anywhere that it is approved by the National Board of Underwriters?

A. If there is an approval, I didn't see it. There may be an Underwriter's label someplace on there, but I didn't see it.

Q. Does that label mean much?

A. It means to me about as much as your Supreme Court decisions mean to you, and it means you have a great deal of respect for it.

(There were no further questions and the witness was then excused.)

HAROLD LITTLE

was then called as the next witness for the defense, and having previously been sworn, then testified as follows:

Direct Examination

Q. (By Mr. Taylor): I believe you are the same Mr. Little that testified here at the request of the Government a few days ago? A. Yes.

Q. And I believe at that time you testified that you had been an electrician for approximately eight years? A. Yes, sir. [434]

Q. Are you following that occupation at the present time? A. Yes, sir.

Q. What training do you have in regard to electrical work?

A. Well, I actually got part of that out of the service as a radio mechanic.

Q. Did your training then give you a knowledge, a practical knowledge of electricity principles?

A. Well, more or less the theory there of electricity.

Q. Then you have had practical work too, have you? A. Yes.

Q. And I believe you stated that you lived at Kotzebue? A. Yes.

Q. And that you were acquainted with a building known as the Kotzebue Grill? A. Yes.

Q. How long have you lived at Kotzebue?

A. Well, it has been off and on for the last four years. I have been there for the last three almost complete.

(Testimony of Harold Little.)

Q. What kind of a light plant do they have at Kotzebue at the present time?

Q. They have three units there of 250; two of them Fairbanks-Morse and a Caterpillar KW.

Q. And is that an REA financed operation?

A. Yes, sir.

Q. Do you know what voltage is put out to serve the consumers or house [435] users or domestic users?

A. You can have three phase. There is a four-wire system.

Q. What is the voltage?

A. Well, I think either way with that system it would be 110 or 220.

Q. 220 is for cooking units, is it not, mostly?

A. Yes.

Q. And you say 110?

A. Well, to 115.

Q. And that is for your ordinary domestic users?

A. Yes.

Q. Now, were you in Kotzebue on the 25th day of December, 1957? A. Yes, sir.

Q. Did you happen during that day to be at the Kotzebue Grill, at the Grill building?

A. I was there the night of the fire.

Q. When did you first learn of the fire?

A. I don't know the particular time. It was just after the bell was rung, a few minutes after that.

Q. When you heard the bell ringing what did you do?

A. Well, I didn't know exactly where it was, but I was getting dressed to go out, and Margie

(Testimony of Harold Little.)

Lincoln came in at that time and told me it was the restaurant.

Q. When you learned it was the Kotzebue Grill, what did you do?

A. Well, I went right down to the fire.

Q. What part, if any, did you take in fighting the fire? [436]

A. Well, first I entered through the north side of the building, went into the kitchen and from there through the outside and then up the stairs and back to the fire area.

Q. How long did you remain up there, Mr. Little?

A. Well, I left right out of there, just in a few minutes or maybe less, because there was some empty pails there and I took them back down with me and went back down into the kitchen and relieved Gene Starkweather who was bailing out water there.

Q. How long did that continue?

A. Well, I remained there for some time.

Q. What would you say, what would you estimate that time to be?

A. Approximately ten minutes.

Q. About how long did it take to get the fire out?

A. Well, I was down there and pretty soon there were no pails to be used; they weren't coming back. So I went out to investigate why they weren't coming back and then by that time they had a bucket brigade coming from the beach.

Q. Now did you have anything to do in regard

(Testimony of Harold Little.)

to the electric distribution system in the Kotzebue Grill building that evening?

A. It wasn't until three o'clock the following morning.

Q. What did you do at that time, Mr. Little?

A. Well, they came back over—I had went back to bed—and they came over to get me again.

Q. By "they" who do you mean?

A. Well, it was Charlie Wilson that came in, followed by Steve in just a few minutes. [437]

Q. Then, following their call at your place, what did you do?

A. Well, I went down there to put the lights on, get the electricity back on.

Q. What did you have to do to put the lights on?

A. Well, I went upstairs first, into the one room which is right directly over the kitchen, and there is a ventilator there and that one extension in there. I was going to run a feeder into the front part of that room, and there was a cord in there which was just a standard light cord, and I was going to make connections from the middle hallway down through the rest of the hall to connect on to the distribution panel.

Q. By use of the word "ventilator" do you mean the trap door in the ceiling?

A. No. This is in between the kitchen.

Q. On the second floor, is that right?

A. Yes.

Q. Did you have occasion to go into the attic?

(Testimony of Harold Little.)

A. I did. I went up through the burned area trap door and went forward, and there was one of the native boys with me, and I don't know who he was. At least I don't recall who he was, but there was one boy who went up with me and he had a flashlight and I had one, and there is a partition forward of the burned area approximately two and a half feet high, something like that. At least you have to crawl over the top of it. And I was on the far side of that, toward the beach side, and I disconnected the wiring there, cut those wires off of that side, isolating the burned area.

Q. By doing that were you successful in getting the lights on in the building? [438]

A. Yes, I did. I got the lights on, but apparently most of the trouble was right down at the connection in the distribution center.

Q. Did you make an inspection of it?

A. Yes.

Q. What did you find?

A. I removed a single bolt and switch and I just twisted the wires together and we got lights. I did have to try the fuse a few times there and it did go on.

Q. Now, Mr. Little, you testified a few days ago, I believe, that the wiring of that building was in bad shape. Would you state from your inspection of that electric distribution system in the building as to what you found that caused you to have the opinion that it was very bad wiring?

A. Yes. It is very, very poor wiring.

(Testimony of Harold Little.)

Q. Just what did you find that you felt caused you to have that opinion?

A. Well, in the first place you have three-phase power coming in and they have a single meter for each phase. Rather than any entrance cable coming through, just some wires run out to the building and hook on to your service. That's for your entrance. Then below every one of your meter boxes you have double plugs, just screw-in type plugs, and that is your distribution. Then your wires will go in any direction.

Q. Before we go any farther, what would be, as an electrician, what would be your objection to that particular part of the distribution system that you have just mentioned?

A. Well, at least you should have some entrance cable, or better yet, some conduit coming in, and then use a three-phase meter, and then fuse boxes [439] of some description to isolate your circuit.

Q. What kind of switches did you have on the main line coming in?

A. Well, you ran through your meter boxes and then, I imagine those are 30 amperes, 30 amp.

Q. Continue. Now what else did you, in your inspection of this distribution system, find that was not accepted practice?

A. Well, in any of your places upstairs you have a combination of tube and knob wiring.

Q. Will you just explain to the jury what tube and knob wiring is.

A. Tube and knob is a good installation if it

(Testimony of Harold Little.)

is made up right. But it is an old, old type of wiring. You never see it nowadays. Fifty years ago, yes, it was standard procedure. But it is outdated; there is no use for it now. They don't use that type of wiring. You might see it sometimes in temporary buildings, but that would be the size of it, in a temporary building, you would have it in six months use by a contractor or something like that, in a store building or storage.

Q. What is the danger in using tube and knob wiring?

A. It's just not in common use any more; it's not very practical.

Q. In addition to tube and knob wiring, what other type of wiring did you find?

A. Then they break right off from tube and knob and go to BX, and this BX is left floating, that metal part of your BX. There is no ground to it and it should be grounded.

Q. How much of that BX was used in the attic, did you notice?

A. Practically all of your switch legs, and then you run down your switch [440] legs and out to your different lights. That was all in BX, and it would branch off for each room. That is just the way they were going through there from your tube and knob wiring.

Q. How was this wiring placed or located in respect to the other wiring in the building?

A. Well, it wasn't actually a true tube and knob, just more or less two single conductors or

(Testimony of Harold Little.)

wires running down through the top of the building and then used the distribution off of that.

Q. Were there any lines that crossed other lines?

A. Well, there is bound to be in there.

Q. What type of crossing would they make with it?

A. I think if you went up there right now and looked you would see a piece of water pipe in this here tube and knob wiring.

Q. Is that accepted practice?

A. Not hardly.

Q. What would be the danger of that? Of using water pipes to put wires across?

A. Well, I don't know.

Q. Well, what other things did you see, if any, that was contrary to the accepted practice of wiring buildings?

A. Well, it was all very poor. There is nothing in there that is right. There just isn't. The wiring is extremely poor.

Q. Then from your inspection of that building and the wiring, what would be your opinion of it?

A. Well, there is no code for it, not written for any code; it's just too poor a grade of wiring. [441]

Q. Now did you inspect any of the fuses or fuse boxes?

A. Yes. When I went over there, apparently they had knocked out the fuses at some time or other, and they were all backed with pennies when I got over there.

Q. Do you know when those pennies were put in?

A. No, I don't.

(Testimony of Harold Little.)

Q. Could they have been there for quite some time?

A. I don't know. I can assume—They were there when I was there. Joe was there too. He could have put them in then or previously, before that or at that time. I don't know.

Q. Had it ever been brought to your attention that there was trouble in the wiring in the building prior to that night?

A. Well I had helped out a few times there. Just a little over a year ago I did do some wiring there for Steve, to put his deep fryer on.

Q. What happened to the deep fryer?

A. Well they had this here 220 deep fryer and it was hooked up to a 110; it was 220 and should have been on a 220 circuit. So I just changed it around and gave them a 220.

Q. Are you familiar with the principle of the generation of heat by induction? A. Yes.

Q. I hand you, Mr. Little, plaintiff's Exhibit L. Could you state what that larger piece of wire is?

A. It's a piece of BX.

Q. What's that? [442]

A. This piece right here (indicating), is BX.

Q. What is that used for?

A. That is for electric wiring.

Q. But does that carry any current itself?

A. No. It should be grounded.

Q. But what does carry the current?

A. It would be your insulator wires. They were here at one time.

Q. Did you have insulated wires—one or more?

(Testimony of Harold Little.)

A. Two.

Q. Two or more? A. Two or more.

Q. Then you say one should be grounded?

A. Yes. One is a neutral.

Q. By neutral, what do you mean?

A. Well a neutral is—when you have power, your current goes out from the source and turns around and comes back. It goes out and lights your bulb up, or whatever you have it in, and comes back through the neutral. One is the hot side and the other one is the neutral.

Q. Now what would you say as to the connecting up of these neutral wires in that system? Were they connected properly?

A. Well, you can't hardly say; as I stated the wiring was poor.

Q. And when you say something is poor, you mean it is incorrect. Now Mr. Little, from your experience what would be your opinion as to whether or not these wires which came out of here have been subjected to considerable heat?

A. Well, they have been hot. [443]

Q. From an inspection of the piece you called BX could you state whether or not that had been from heat generated inside the BX or from heat generated exteriorly?

A. Well, I am just an electrician and that is getting out of my class; but I can definitely state this has been hot.

Q. And would you examine that piece of BX there and examine it to see, and state whether or not you see anything indicating that part of the

(Testimony of Harold Little.)

insulation has boiled out through the BX?

A. I, personally, right now—this has been taken apart, and I just couldn't.

Q. I mean, examine the BX and state if there is any indication that that has been heat so intense inside that the insulation has come through.

A. Well definitely there is insulation on the outside here. You can—this has been hotter than this part down here (indicating).

Q. Well, then you think it has been subjected to great heat? A. It has.

Q. What heat would have to be applied to that to burn the insulation off of those interior wires?

A. It would be induction heat.

Q. Induction heat? A. Yes.

Q. What degree of heat can be induced by induction?

A. Well for induction heat they have regular induction furnaces.

Q. This heat is on the same principle but not induced in the right place, is that correct?

A. That is right. [444]

Mr. Taylor: If your Honor please, I think this would be a good time to take a recess.

The Court: Yes. I expect you would like about fifteen minutes. Well, we are not too rushed for time. We will take a recess for fifteen minutes until approximately 3:20.

(Thereupon, at 3:05, the jury was duly admonished and court recessed for fifteen minutes.)

(Testimony of Harold Little.)

(After recess.)

(At 3:20 p.m. court reconvened and the trial of this cause was resumed. Both counsel stipulated to the presence of the jury and Mr. Little resumed the stand for further direct examination.)

Q. (By Mr. Taylor): Now, Mr. Little, when you went into the attic of the Kotzebue Grill on the morning, I believe it would be the 26th of December, and you say that you cut off some lines, how many lines did you cut off?

A. I just cut two single conductors off.

Q. Two single conductors? A. Yes.

Q. You didn't have to cut through any BX?

A. No. Just the lines to the lights in the rear part of the building.

Q. To where the fire occurred? A. Yes.

Q. And that was the extent of it?

A. Yes. [445]

Q. And when you cut this off, did it straighten out the electricity?

A. Well, the switch downstairs was burnt out.

Q. Had it been shorted or what?

A. Your load had killed it.

Q. You said it had burnt the switch out?

A. Yes.

Mr. Taylor: I believe that's all.

Cross Examination

Q. (By Mr. Hermann): Mr. Little, will you examine this diagram of the building?

(Testimony of Harold Little.)

A. Yes.

Q. Does that seem generally to illustrate the floor plan? A. Yes.

Q. Would you put an X where you cut this wiring?

A. Well it would be in the next floor above—before you——

Mr. Taylor: Just a minute. I might be wrong, but I thought we had another X on there. I am not too sure about that. There is something we put an X on.

The Court: There is an X here; that is in the same room.

Mr. Taylor: I think another symbol of some sort.

The Court: You could put the word "cut". It would be more illustrative.

Mr. Taylor: Or the word "cut."

The Court: That's what I just suggested.

A. I'm afraid you are missing a room here. About in here (indicating) you had a small storage room. [446]

Q. (By Mr. Hermann): Isn't that there?

A. No. That was where the fruit was and all that.

Q. This storage here (indicating), would that be it? A. No. It's on this side over here.

Q. Where would it be in relation to the bathroom?

A. Well, I don't recall. But something is wrong here, I know. I can't put my hand on it.

(Testimony of Harold Little.)

Mr. Taylor: Maybe the fact that here is the hatchway to the attic in the hallway?

A. Yes.

Q. (By Mr. Hermann): Could you show us where this cut would be?

A. Yes. It will be right close to this hatchway here (indicating); and this partition I climbed over in here. Then on this side I done this cutting, just over the top of that partition.

Q. Would you put "cut" on this? A. Yes.

(The witness marks the exhibit.)

Q. Now would you explain that—show us where you put the word "cut".

A. Right in here (indicating); just on the other side of this deal. You have to climb over the top here and then just on the other side here there is this switch leg that goes down to here (indicating).

Q. And that is where you cut it; and the partition would be between there, and this room would be then somewhere in here?

A. It would be on this side of the partition (indicating). [447]

The Court: Except in the attic above.

Q. (By Mr. Hermann): Well, now could you point an arrow in the direction the wire took off toward the site of the fire where you cut it.

A. It took off in this direction and then came back and went over to these other lights.

(The witness marks the exhibit.)

Q. Do you know how it came back and went over to the other lights?

(Testimony of Harold Little.)

A. No, I don't because I wasn't interested in that part of the building, because I just wanted to isolate that particular area.

Q. Now what kind of wire was it that you cut?

A. Single conductor BX stripped back.

Q. That was BX that you cut?

A. Well, it was stripped back BX. What I mean by that, probably you cut your BX and pulled it off and then you have a single conductor coming up; and then you go back to tube and knob, and there is some distance in between.

Q. Well, the wire leading into the attic, into the burned part of the attic, was that of the BX type? A. It was, yes.

Q. Now you stated you don't know when the pennies were put in the box?

A. There was pennies there when I arrived at the scene.

Q. Do you know whether anybody was working with that?

A. Well, Joe had been working on it. There might have been 20 people working on it.

Q. And you stated the switch had been burned out?

A. Yes. There was a switch which you could look at and see it was burnt. [448]

Q. Assuming that the lights, at the time of the fire, had been on in the back end there, the portion which you cut off, would that switch have to have burned out of that?

(Testimony of Harold Little.)

A. That switch apparently burnt out during the fire.

Q. With that switch burned out, would that light be out for good until the switch was fixed?

A. The lights were on and off a couple of times during the fire.

Q. Would the fact that the switch was burned out put them off for good?

A. That's what happened.

Q. That wire burned off during the fire or shortly after?

A. Well, it burned off during the fire while we were fighting it.

Q. Where was the water pipe that you mentioned that had wires in it?

A. Up in the attic, back a little bit farther this way (indicating).

Q. Is it near the place where the fire was?

A. No, it's farther over this way (indicating) in the building.

Q. Then there is no tube and knob in the fire area is there?

A. No. That was BX.

Redirect Examination

Q. (By Mr. Taylor): Mr. Little, now you say the switch leg goes up to the place which you had cut off that circuit. What would cause that switch to burn out?

A. Well probably an overload.

Q. Could that overload be either by a short or by induction building up?

A. Either one.

(Testimony of Harold Little.)

Recross Examination

Q. (By Mr. Hermann): Just one question, Mr. Little. Could the overload be caused by any other reason? A. Well, I don't know.

Q. Is it possible that there could be another reason. A. Clear your statement, please.

Q. You testified that it could have been caused by a short or by induction, did you not?

A. It could be either one.

Q. Could it be anything else besides that?

A. What do you mean by anything else?

Q. For instance, too many appliances on it or something like that.

A. Well that would be a load.

Q. It could have been an overload then?

A. It was a 10 amp. switch.

Q. I see. No further questions.

Mr. Taylor: It is understood then, Mr. Little, that you may be excused from attendance if you wish to get back home.

A. I sure do.

The Court: Very well.

(There were no more questions and Mr. Little was excused from further attendance.)

GENE STARKWEATHER

is then called as the next witness for the defense and after being duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Taylor): Will you state your name please?

(Testimony of Gene Starkweather.)

A. Dwight Gene Starkweather.

Q. Where do you live, Mr. Starkweather?

A. In Kotzebue.

Q. How long have you lived there?

A. Almost three years.

Q. What is your occupation? Or occupations?

A. Pilot part of the time; prospecting; guide sometimes.

Q. You are also a flyer? A. Yes sir.

Q. How long have you lived in Alaska?

A. Oh, seven or eight years.

Q. Are you acquainted with Steve Salinas, the defendant in this action? A. Yes.

Q. How long have you known him?

A. Oh, let's see—about two years I guess.

Q. Where was that acquaintance?

A. Kotzebue.

Q. Now were you in Kotzebue on the 25th day of December, 1957?

A. Yes, I was there Christmas.

Q. Calling your attention to the evening, late in the evening of that date, did anything unusual happen, Mr. Starkweather?

A. There was a little fire there.

Q. Do you remember and can you state about what time that fire occurred?

A. The exact time, no. [451]

Q. Approximately?

A. In the middle of the night.

Q. Where were you when you first heard there was a fire?

(Testimony of Gene Starkweather.)

A. I was up at Stocker's cafe with Tommy Goodwin.

Q. When you heard the fire alarm what did you do? A. I didn't never hear the alarm.

Q. You didn't ever hear the alarm? When did you first hear of the fire?

A. Margie Lincoln came running in and told me there was a fire, Tommy and me. We just followed her down.

Q. What?

A. We had just left her down the street at Pete Lee's Pool Room and she went in there to Dan's.

Q. Tommy—who did you say the name was?

A. Goodwin.

Q. What did you and Tommy do?

A. Took off down there.

Q. When you arrived at the Kotzebue Cafe what, if anything, did you see there?

A. Well, I seen a fire glowing up above there, above the corner where the stack is, and I thought maybe it was a stack fire. I kicked a window out there and went in and a couple of other boys went in there, but I am not sure who they were.

Q. Where was the window located that you kicked out and went it through?

A. On the kitchen.

Q. Into the kitchen? A. Yes. [452]

Q. When you got into the kitchen, what did you do?

A. I give one of the boys a flashlight and told him to find the baking soda and shut off the oil

(Testimony of Gene Starkweather.)

stove. And as soon as I got the stuff I doused it. We found a box and a half of baking soda and I kicked the lid loose and put the fire out.

Q. Why did you do that?

A. Like I say I thought it was a stack fire, and that puts them out.

Q. Baking soda will put out an oil fire?

A. Right now.

Q. Was one of the boys that went in there with you a Johnny Smith or Gene Smith or Isaac Snyder?

A. I am not positive on that. Like I say, I gave one of them my flashlight. Who it was I am not too sure of that. It's been quite awhile and I was pretty busy there—you know—for a few seconds. Whoever it was I gave him my flashlight. The valve for the stove was right there, and just as I finished shutting off the valve he handed me this box and a half of baking soda.

Q. Did you see Joe Brantley while you were there?

A. He came in just as I kicked the lid loose and put the soda in, because I had the lid loose and turned around and seen Joe.

Q. Was anybody in the downstairs of the Kotzebue Grill at the time you and this boy or boys went in there? A. No.

Q. You were the first one in the cafe?

A. In the cafe, yes. [453]

Q. Then what happened?

A. I went out the front door and went around

(Testimony of Gene Starkweather.)

and went upstairs. There was a whole bunch of them going in the door then. I went right in with them.

Q. What part of the building did you go into?

A. In where there was an attic hole there, an entrance trapdoor of some kind.

Q. What, if anything, did you see in that trapdoor? A. Lots of fire.

Q. Fire? A. Yes.

Q. Smoke?

A. Well, I didn't notice too much smoke; I just noticed the fire. I wasn't looking for smoke.

Q. What, if anything, did you and/or any of the others do in regard to getting up into the attic?

A. Well, there was a chair there. There was a case on it, a case of canned goods. I hopped on that and took one look in the attic and hopped back down, and I said I would see about some water, and I went back downstairs, and the boy that was working for Alaska Airlines—I don't know his first name—he is one of the Sheldon boys—he was coming up the street with some CO-2 bottles, and I took them upstairs and Tommy put Joe Brantley up in the attic and he started using them bottles, and I went back downstairs.

Q. Let's get back to these CO-2 bottles. How big are those bottles?

A. Oh, they stand approximately that high.

Q. And what are they made out of? [454]

A. Steel.

Q. And what about the weight of them?

A. Oh, the exact weight I don't know.

(Testimony of Gene Starkweather.)

Q. Now when Tommy handed the CO-2 bottle up to Joe Brantley, what did he do with it?

A. Well, he started using it. Well, he handed him one and he started using it, and just got a squirt out of it and dropped it back down and said it was empty; so I believe Tommy handed him the other one; and I tried the one that was supposed to have been empty, and it was not empty, and I told him that that one was not empty, and to put it back up when he finished the one that he was using, and I went downstairs.

Q. What would you say those weighed when they were full?

A. I don't know, thirty or forty pounds, I guess, something like that. Maybe not quite that but pretty heavy.

Q. When you went back down where did you go?

A. I went back into the rear part because there was a lot of boys there with buckets but not water, and there were three or four barrels in there full of water, in the cafe.

Q. Where were the barrels?

A. In the kitchen.

Q. Then what did you do and what did these other boys in the kitchen do?

A. Well, I took a big garbage can there and I started bailing water with a bucket and filled that up and they sent that upstairs, and by that time Harold Little come in and he said that he would bail, and I just kind of wandered around downstairs. [455]

(Testimony of Gene Starkweather.)

Q. What were you carrying the water in?

A. I didn't carry any water.

Q. You didn't carry any water?

A. It was just about that time somebody got a hole poked through the ice, right in front there.

Q. Then you had a bucket brigade?

A. Well, Tommy had that—in a few seconds they had it buckets going fast.

Q. Did you see Mr. Salinas there that evening?

A. During the fire, yes. I seen him.

Q. How was Mr. Salinas dressed?

A. Well, I don't usually pay much attention to how men are dressed. But he always dressed pretty neat.

Q. How were you dressed that night, Gene?

A. Oh I think I had on an old pair of jeans and an old jacket.

Q. How cold was it, if you know?

A. Oh, I would say approximately 35 below.

Q. Did you see Joe after Mr. Goodwin, Tommy Goodwin—is that his name?

A. Yes.

Q. After Tommy Goodwin got him in the attic, did you see him later?

A. Yes, I seen him when I saw Mr. Salinas down in the kitchen part, and at the time Steve was talking to him about getting some boys to clean up there, get the water out and everything, because it was coming through the ceiling.

Q. Was the fire under control at that time?

A. Yes, it was. [456]

(Testimony of Gene Starkweather.)

Q. How long did you remain there that evening?

A. Well, I went home.

Q. Where did you live in relation to the Kotzebue Grill. A. Houses or feet?

Q. Both—feet or yards.

A. Approximately 200 feet from it.

Q. Do you live with anybody there?

A. Yes. I live with Harold Little.

Q. Now shortly after that, Mr. Starkweather, did you ever find any keys at your place?

A. Yes, I did.

Q. About what day was that following the fire?

A. Well, I don't know whether it was the day of the fire, the day before, or the day after, because I wasn't questioned about it, about the keys, until nearly two weeks later. One day is just like another day to me.

Q. How many keys were there?

A. There were three of them.

Q. What kind of holder was it, key ring on or key chain? A. Key chain, I believe.

Q. What, if anything, did you do with those keys?

9. Oh, they just kicked around the house there, and on the head of my bed, it's just one of them little shelves and I sort of hung these keys around there. In fact I even hauled them keys up to Point Lay and back.

Q. In a plane? A. Yes. [457]

Q. Did you find out who those keys belonged to or what building they were for?

(Testimony of Gene Starkweather.)

A. Well, I asked several people if they were theirs; Harold was one, and nobody knew then whose they were. About two weeks after the fire or thereabouts, Joe was over there one night——

Q. By Joe, you mean Joe Brantley?

A. Yes. And he was talking about keys, and he said he needed a round key. He wanted——

Q. Did he say what the round key was for?

A. Yes. He said he wanted to break in Steve's juke box but he didn't want to be stuck for breaking and entering.

Q. What did you do?

A. I was sitting on Harold's bed and Harold was sitting there. Joe was sitting on my bed, so I got up and walked over to the side of my bed and the keys were there on the shelf and I tossed them in Joe's hand and went over and sat down, and I said "will that key do you any good?", because one of them was similar to a round key. I don't know—it was just a phony looking key. And he looked at it and threw them over to me, because I was sitting on the other bed. Then it must have been a couple of minutes passed and he said, "let me look at them keys." So I handed them to him and he said they were keys to Steve's restaurant.

Q. Then what did he do with the keys?

A. I took them back.

Q. Was the key to the juke box on that key ring or key chain?

A. I don't know. [458]

Q. You took the keys back?

(Testimony of Gene Starkweather.)

A. Yes, I took them back.

Q. What ultimate disposition did you make of the keys?

A. Well, Joe went over and got the sheriff and he took the keys and give me a slip for them, and that's when he questioned me too a little bit about the fire.

Q. You say the sheriff—do you mean the marshal, the deputy marshal? A. Yes.

Q. Then you gave them to him, to the marshal?

A. No. It was the next day I gave them to him. He asked me over to his office then.

Q. Did Joe Brantley still have his keys to the place?

A. He had a set of keys with him there that he matched with those.

Mr. Taylor: I would like to have this marked for identification.

(A paper sack containing sawdust is marked as defendant's Exhibit No. 11 for identification.)

Q. Now, Mr. Starkweather, I would like to have you take a look at that identification No. 11 and examine it and state, if you can, what that is. Can you state what that is?

A. It looks like that sawdust I brought down from Steve's attic.

Q. From Steve's attic? A. Yes.

Q. Did you get that sawdust yourself?

A. Yes, I did. [459]

Q. From whereabouts in the attic?

(Testimony of Gene Starkweather.)

A. From right below where they had cut a section of wiring out, where the fire was burning. In fact it was from the worst of the burn right there.

Q. From where it was burned the worst—where the greatest heat was? A. Yes.

Mr. Taylor: I would like to introduce this in evidence, your Honor, as defendant's Exhibit No. 11.

The Court: Was it shown when this was taken?

Q. (By Mr. Taylor): When was this taken, since after the fire?

A. Yes. That was taken Monday night.

Q. Monday night of this week?

A. Yes, sir.

The Court: Is there any objection, counsel?

Q. (By Mr. Taylor): At whose request was that taken?

A. Fred Crane's. I got a letter from him and he asked me if I would go in and bring him a couple of pounds of sawdust down from the attic.

The Court: Any objection, Mr. Hermann?

Mr. Hermann: I have no objection.

The Court: It may be received.

(Defendant's Exhibit No. 11 is received in evidence.)

Mr. Taylor: Now could I have the chart.

(One of the exhibits is given to Mr. Taylor.)

Q. (By Mr. Taylor): Now, Mr. Starkweather, plaintiff's exhibit F purports to be a floor plan of the second floor of the Kotzebue Grill building. This purports to be the manhole or trapdoor going into the attic (indicating). Would you just mark on

(Testimony of Gene Starkweather.)

there with the symbols "s" and "d" approximately where you got the sawdust.

(The witness marks the exhibit.)

The Court: I was just thinking, counsel, for purposes of illustration, we have some photos of the attic. This is not the floor plan of the attic. The photos might be more illustrative.

Mr. Taylor: We have an orientation point in the manhole—see.

The Court: Yes. I see. Very well.

Mr. Taylor: And he said he took the sawdust from the highest point of flame, where the fire was the worst, which would be right in here.

The Court: At least that's the way it appeared to me.

Q. (By Mr. Taylor): Yes, you can show about where that was. I will hold that up and will you point out to the jury the place approximately from where you took the sawdust.

(The witness points on the exhibit.)

Q. And will you point out then the manhole or trapdoor?

A. That's the one there (indicating).

Mr. Taylor: Did the jury see that all right?

(The jury members nod affirmatively.) [461]

Cross Examination

Q. (By Mr. Hermann): You testified that when you got there you broke in a window. Is that correct? A. That's right.

Q. Prior to that time you had not seen Mr. Brantley? A. No, I hadn't.

Testimony of Gene Starkweather.)

Q. Is it possible he could have been in and out of the kitchen shortly before you broke in the window?
A. No.

Q. Why not?
A. Everybody was standing outside hollering where's Joe? He's got the keys."

Q. What does that indicate? Maybe he was upstairs.
A. Joe wasn't there then.

Q. How do you know? Did you go upstairs?
A. When I left the lower part I did. Joe had just got there.

Q. How did you leave the kitchen?
A. I went out the front door of the building.

Q. Did you try the side door?
A. No.

Q. You don't know then whether it was locked or unlocked.
A. I unlocked the door I went out.

Q. Would you just answer the questions, please. You don't really know then when you found these keys you mentioned?
A. No, I don't. [462]

Q. Could it have been as long as a week after the fire?

A. It was nearly two weeks when the marshal questioned me about when I found the keys, and trying to remember back for such a small matter, it's just impossible. I didn't know whose keys they were; there was nothing exceptional, and I just had nothing to tie it down to the exact day.

Q. Well, if you don't remember when, how do you know it was two weeks when the marshal questioned you?

A. Just a little bit after I found the keys I went

(Testimony of Gene Starkweather.)

to Point Lay, and up to then I hadn't identified them at that time.

Q. When did you go up to Point Lay?

A. I believe it was three days after the fire.

Q. So all you can say is that you had them sometime before you went up to Point Lay three days after the fire?

A. Um-hum. I couldn't say I found them before the fire or even after. I don't know for sure.

Q. You don't know when you found the keys?

A. No.

Q. You found them on the bed, did you?

A. Yes.

Q. And they remained in your possession from the time you found them—is that correct—until the marshal took them?

A. Part of the time I had them in my pants. Originally I thought they were Harold's, and I put them in my pants, and after I asked him about it, I tossed them just up to the head of my bed there, on the shelf. From then on they just laid there. [463]

Q. And you don't know whether that was before or after the fire they just laid there?

A. That was after the fire.

Q. Was that after your trip to Point Lay?

A. What?

Q. Well, up until your trip to Point Lay they were in your pocket? Is that correct?

A. Yes. That's from the time I found them on the bed.

Q. Have you been up to Kotzebue recently?

(Testimony of Gene Starkweather.)

A. I just came through there.

Q. Had you been staying there recently?

A. I just came from Point Hope.

Q. You were in Kotzebue Monday, were you?

A. Yes.

Q. How long did you remain there on that occasion? How long were you in Kotzebue?

A. Until I got the plane down here day before yesterday.

Q. Do you know what the temperature has been in Kotzebue during the daytime?

A. Well, it gets pretty wet.

Q. What has it been? A. I don't know.

Q. Do you fly? A. Yes.

Q. When you fly do you keep track of the temperature? [464]

A. When I am flying, yes.

Q. Has it been warmer than it was in December? A. Quite a little bit.

Q. Did you take the sawdust yourself from the attic? A. Yes.

Q. Who was present when you did so?

A. No one.

Q. And has that sawdust been in your possession since then?

A. Until I gave it to Fred when I got down here.

Q. When was that? A. Two days ago.

Q. Can you be absolutely certain that it is the same identical sawdust?

A. It sure looks like it.

(Testimony of Gene Starkweather.)

Q. Could anything have been added to it without your knowledge? A. Oh yes.

Mr. Hermann: No further questions.

Redirect Examination

Q. (By Mr. Taylor): Mr. Starkweather, where did you say you found the keys?

A. On my bed.

Q. Do you know who lost them?

A. No, I don't. It's possible though that Joe lost them over there because he come over there the night of the fire.

Q. About what time?

A. I don't know. He came over there—it might have been an hour or so after the fire. [465]

Q. What did he come over for?

A. He wanted to get my old parka to work in when he was up there because he didn't have one.

Q. Did he get the parka?

A. Yes. He had it for a little over a week.

Q. Did he get anything else? When he got the parka did he get anything else that night?

A. I think he had a cup of coffee when he came over and got the jacket.

Q. What bed or place did he sit down while he was in there? A. I don't remember.

Q. Do you remember whether or not he sat at the place where you found the keys?

A. No, I don't.

(There were no further questions and the witness was excused from the stand.)

RUTH NORTON

was then called and sworn as the next witness for the defense and then testified as follows:

Direct Examination

Q. (By Mr. Taylor): Would you tell us your name please. A. Ruth Norton.

Q. Where do you live, Ruth?

A. Kotzebue.

Q. How old are you? [466] A. 18.

Q. How long have you lived in Kotzebue?

A. I don't quite remember.

Q. What? A. I don't know.

Q. Lived there a long time, have you?

A. Um-hum.

Q. Were you living at Kotzebue in the Christmas of 1957 of last year? A. Um-hum.

Q. Do you live with your folks there?

A. Yes.

Q. Now do you remember on the evening of Christmas Day of a fire at Kotzebue?

A. Yes.

Q. Do you know where that fire occurred?

A. Yes.

Q. Where did that fire happen, Ruth?

A. You mean where it happen?

Q. Yes. Where did the fire happen? Where was the fire? A. Must be upstairs.

Q. Where? A. In the restaurant upstairs.

Q. In the Kotzebue Grill?

A. Yes, Kotzebue Grill.

Q. Now, Ruth, calling your attention to earlier

(Testimony of Ruth Norton.)

in the evening, did you [467] have any — did you pass by the Kotzebue Grill? A. Yes.

Q. Can you remember what time it was that you passed there? A. Just about seven.

Q. About what? A. About seven.

Q. Do you mean seven in the evening?

A. Yes.

Q. Where had you been, Ruth, before you passed there? A. I came from home.

Q. Where were you going?

A. To the Ferguson's store.

Q. Now when you passed by the Kotzebue Grill will you state whether or not you saw any lights?

A. I saw lights in the kitchen.

Q. You saw a light in the kitchen? A. Yes.

Q. Did you see anybody else there, near the Kotzebue Grill, at the time you went by?

A. I just passed.

Q. Who? A. Martha.

Mr. Hermann: I didn't get that name.

Q. (By Mr. Taylor): What was Martha's last name? [468] A. Martha Hanks.

Q. Martha Hanks? A. Yes.

Q. Did you talk with Martha Hanks at that time? A. No.

Q. What did you say?

A. I just say "Hi" and we passed.

Q. Just a greeting as you passed?

A. Yes.

Q. The only light then that you saw was in the kitchen of the Kotzebue Grill? A. Yes sir.

(Testimony of Ruth Norton.)

Q. You say that was about seven o'clock?

A. Yes sir.

Q. Did you pass by there again that night?

A. No.

Q. That was the only time? A. Yes.

Mr. Crane: Just another question or two, your Honor.

Q. (By Mr. Crane): Did you see any lights shine out of any of the windows upstairs?

A. No.

Q. It was dark up there? A. It was dark.

Mr. Taylor: You may take the witness. [469]

Cross Examination

Q. (By Mr. Hermann): Ruth, you say this was about seven? A. Yes.

Q. Now, "about" — what do you mean by "about"? Do you mean that it was earlier, that it could have been earlier?

A. Well, around seven I think.

Q. Was it exactly seven?

A. Not quite. I started from home and came to town, it was 6:30 and passed through about seven.

Q. You came toward town from your home at 6:30? A. Yes.

Q. How long does it take to get to town?

A. I don't know.

Q. But you figure it was about seven before you got to town?

A. Yes. I figure it was about seven.

(Testimony of Ruth Norton.)

Q. Could it have been a little later? Or could it have been a little earlier?

A. Just about seven.

Q. You looked at the time before you left?

A. I did.

Q. And did you see anything at all besides a light in the kitchen? A. No.

Q. You couldn't see anybody in there?

A. No.

Q. Did you actually look upstairs to see if there was a light? [470]

A. There was nothing there.

Q. Did you look?

A. I looked. There was no light.

Q. Why did you look? A. I don't know.

Q. What were you looking for? Someone?

A. No.

Q. How did you happen to look up there?

A. When I see that light in the kitchen I happen to look up.

Q. Were you looking for someone in particular?

A. No.

(There were no further questions and the witness was excused from the stand.)

MARTHA HANKS

was then called as the next witness for the defense and after being duly sworn testified as follows:

Direct Examination

Q. (By Mr. Taylor): Would you please tell us your name, Martha? A. Martha Hanks.

(Testimony of Martha Hanks.)

Q. Where do you live Martha?

A. Kotzebue.

Q. How long have you lived there?

A. Six years now.

Q. About six years? A. Yes. [471]

Q. How long have you—Before you came to
Kotzebue, where did you live? A. Point Hope.

Q. Were you born at Point Hope?

A. Yes.

Q. How old are you, Martha?

A. Seventeen.

Q. Now were you living in Kotzebue last Christ-
mas? A. Yes.

Q. You lived with your parents there?

A. Um-hum.

Q. Now do you remember a fire at Kotzebue
on Christmas Day or the night of Christmas?

A. I was home. I was home that evening. My
sister was out.

Q. And she saw that fire? Do you remember
the fire taking place, do you, Martha?

A. No.

Q. You didn't see it?

A. I didn't see it. I had no baby-sitter by that
time.

Q. But you do know that a fire did occur on
that night? A. Um-hum.

Q. Now, Martha, calling your attention to
earlier that day, earlier that evening, were you at
any time near the Kotzebue Grill?

A. I was at the Grill about 6:15.

Q. 6:15. Where had you been?

(Testimony of Martha Hanks.)

A. I went to Ferguson's and stayed there for awhile. [472]

Q. What time did you leave Ferguson's?

A. Fifteen after seven.—Fifteen minutes to seven I went home.

Q. What?

A. Fifteen minutes to seven I went home.

Q. Then when you left Ferguson's did you pass the Kotzebue Grill on your way home?

A. I didn't pass over that way; I walked toward Hansen's way.

Q. Did you see anybody near the Kotzebue Grill? A. No.

Q. What? A. No.

Q. Do you know Ruth Norton? A. Yes.

Q. Did you see her that evening?

A. I didn't see her then but I saw her about 6:15 there by Ferguson's.

Q. You saw her about 6:15 then? A. Yes.

Q. How far is Ferguson's from the Kotzebue Grill? A. Right next door to it.

Q. So you were right close to the Kotzebue Grill. Is that right? A. Yes.

Q. Now at the time you talked to—Did you talk to Martha, or to Ruth rather?

A. I was talking to Ruth.

Q. Did you talk to her? [473] A. Yes.

Q. What did you say?

A. Her and I was having jokes there, teasing each other.

Q. Where was that? What time was that?

(Testimony of Martha Hanks.)

A. Right outside Ferguson's.

Q. You had what?

A. We were teasing each other there.

Q. How long did you talk there?

A. We talked for about ten minutes. Then we walked in Ferguson's.

Q. You went into Ferguson's? A. Yes.

Q. Did you happen to look into the Kotzebue Grill when you went by it? A. No.

Q. Did you see any lights there?

A. I didn't see no lights there.

Q. Was the front of the place dark?

A. Um-hum.

Q. Did you see any lights shine from the upstairs windows? A. No.

Q. You think you were there a few minutes with Ruth though, about the time you went by there?

A. Yes.

Q. You think maybe it was five minutes?

A. I think so.

Q. Was it pretty cold that night? [474]

A. Yes, it was kind of chilly out. We walked in.

Cross Examination

Q. (By Mr. Hermann): Did you see Ruth before or after you went into Ferguson's?

A. I saw Ruth there.

Q. When was it? Before or after you went into Ferguson's? A. Before we go into Ferguson's.

Q. That was before the first time you went into Ferguson's? What time was that?

(Testimony of Martha Hanks.)

A. 6:15.

Q. How did you know it was 6:15?

A. I had a wrist watch by me that time.

Q. Did you look at it when you saw Ruth?

A. Yes.

Q. What time did you go inside Ferguson's?

A. About 6:30.

Q. You were out in front about fifteen minutes?

A. Yes.

Q. Was there any particular reason you were watching the time?

A. My dad told me to go home before seven, so I keep the watch.

Q. Now you say you don't recall seeing a light in the Kotzebue Grill?

A. No. I didn't see no light.

Q. Did you look in?

A. Yes. We looked in but we didn't see anybody in there.

Q. What did you look for? Were you looking for somebody? A. No. [475]

Q. Well, what caused you to look in?

A. We just peeked through the window.

Q. You just peeked through. What were you peeking for? A. I don't know.

Q. You must have been looking for something. Whose idea was it to peek in? Your idea or Ruth's?

A. We like to drink coffee there.

Q. You were looking to see if it was open?

A. Yes. And we didn't see anybody in there.

Q. Was there a light in the kitchen?

(Testimony of Martha Hanks.)

A. No light at all.

Q. Was there a light on upstairs? A. No.

Q. Are you sure of that?

A. I am sure. We saw the windows. There was no light there.

Q. The front window. Could there have been a light in the back?

A. I don't know. We didn't look in the back.

Q. Just in the front? A. Yes.

(There were no further questions and the witness was excused from the stand.)

The Court: Well, we have been in session about an hour now. We will take a brief recess before finishing up for the day.

(Thereupon the jury was duly admonished and Court recessed at 4:20 for ten minutes.)

After Recess

Both counsel stipulated to the presence of the jury and all other persons necessary being again present the trial of the cause was resumed.

ISAAC SNYDER

was then called as the next witness for the defense and after being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Taylor): Would you state your name, please. A. Isaac Snyder.

Q. Where do you live, Isaac?

A. Kotzebue.

(Testimony of Isaac Snyder.)

Q. How long have you lived there?

A. Since 1949.

Q. How old are you Isaac? A. 19.

Q. Were you living at Kotzebue Last Christmas day, Christmas in 1957? A. Yes sir.

Q. Do you recall a fire occurring the night of that day? A. Yes.

Q. Now calling your attention to earlier in the evening. Were you in the town of Kotzebue?

A. Yes.

Q. Calling your attention to six o'clock or about there, where were you?

A. At six o'clock I was at Pete's. [477]

Q. Pete what?

A. I was shooting pool at Pete's.

Q. Pete Lee's pool room? A. Yes.

Q. Where does that pool room—where was that pool room in relation to the post office?

A. It was in behind the post office.

Q. Back of the post office? A. Yes.

Q. How far was that pool room from the Kotzebue Grill?

A. Not very far. About fifty yards or less than that.

Q. How far?

A. Not too far, just next door, across.

Q. Now how long did you stay at Pete Lee's pool room that evening?

A. Before the movie start. I went to the movie, I passed through there.

Q. What time was that?

(Testimony of Isaac Snyder.)

A. About ten after seven or something like that.

Mr. Hermann: Pardon. I didn't hear you.

A. About ten after seven.

Q. (By Mr. Taylor): You passed then, by there, going to where? A. Ferguson's.

Q. To Ferguson's? A. Yes.

Q. Then when you left Pete Lee's pool room did you walk towards the [478] Kotzebue Grill?

A. Yes.

Q. And you passed along in between the Kotzebue Grill and the post office? A. Yes.

Q. As you went along there would you state whether or not you saw any lights or illumination in the Kotzebue Grill building?

A. Yes. You can notice it.

Q. What did you notice?

A. You see a light shining right on the roof.

Mr. Hermann: I didn't hear that answer.

Q. (By Mr. Taylor): Would you speak up a little louder, please. Will you repeat your answer and state what you did see.

A. You can notice the light shining on the road.

Q. Where was those lights coming from?

A. Upstairs.

Q. Upstairs where?

A. The upstairs window.

Q. The upstairs window? A. Yes.

Q. After you walked by, past the side of the Kotzebue Grill, which way did you turn when you came to the main street? A. To the left.

Q. You turned left and you passed in front of

(Testimony of Isaac Snyder.)

the building? A. Yes. [479]

Q. Did you notice any lights from that end?

A. You can still see lights in there; there is another window on that side.

Q. Out of what window?

A. On the front.

Q. But what window? A. Upstairs.

Q. The upstairs window? A. Yes.

Q. Then, how long do you believe it took you to walk from Pete Lee's to Ferguson's store?

A. About three minutes.

Q. During those few minutes did you notice those lights were on all that time? A. Yes.

Q. Then after that what did you do after you went to Ferguson's store?

A. I went to the movie.

Q. You went to the movie? Is that right?

A. Yes.

Q. You went inside Ferguson's store?

A. Yes.

Q. Where were you when the fire started Isaac?

A. The movie was over then.

Q. What?

A. The movie was over then. I was at Ferguson's. [480]

Q. Was it at Ferguson's that you went to the movie? A. Yes.

Q. The movie was over then, when the fire was going on? A. Yes.

Q. Did you go to the movie? A. Yes.

Q. After the movie was over the fire started, is

(Testimony of Isaac Snyder.)

that right? A. Yes.

Q. What did you do?

A. When it started I was in there shooting pool and we see there is a fire out there and we went out.

Q. Did you go over to the fire? A. No.

Q. What did you say?

A. No. I didn't go to the fire. I was watching it.

Q. You didn't go to the fire?

A. No. I was watching it.

Q. You were watching it though? A. Yes.

Mr. Taylor: You may take the witness.

Cross Examination

Q. (By Mr. Hermann): Now what time did you leave Pete Lee's pool room?

A. About ten after seven.

Q. Ten after seven. What time was it you had first come to the pool room?

A. About six. [482]

Q. You stayed there over an hour?

A. Yes.

Q. How did you happen to remember that was ten after seven? Was there any particular reason?

A. It was before the movie, I went out.

Q. What time does the movie ordinarily start?

A. 7:30.

Q. Does it start the same on Christmas as it does every day? A. Yes.

Q. Was that just the regular movie?

A. Yes.

Q. Does it start at the same time on Sundays as it does every day?

(Testimony of Isaac Snyder.)

A. On Sundays it starts at a quarter to eight.

Q. On Christmas they kept weekday hours? Is that correct? A. Yes.

Q. So you are basing your time on the movie then? A. Yes.

Q. No further questions.

(There were no further questions and the witness was excused from the stand.)

JOHNNY SMITH

was then called as the next witness for the defense, and after being duly sworn testified as follows:

Direct Examination

Q. (By Mr. Taylor): Johnny, when you answer the questions will you speak up so the Court and jury can hear you. Now would you tell them your name? A. John Smith.

Q. Where do you live Johnny?

A. Kotzebue.

Q. How long have you lived there?

A. Twenty-seven years.

Q. Seven years?

A. Twenty-seven years.

Q. Were you born there? A. Yes sir.

Q. One of the old timers there. Were you living in Kotzebue on the Christmas Day of last year, 1957? A. Yes sir.

Q. By the way, how old are you?

A. Twenty-seven.

Q. Do you remember a fire occurring in Kotze-

(Testimony of Johnny Smith.)

Q. Were you in Kotzebue on December 25, 1957? A. Yes sir.

Q. Now calling your attention to earlier in the evening of that day, were you in the town of Kotzebue? A. Yes sir.

Q. Where do you live, Johnny, in regard to, say, the downtown part of Kotzebue? How far do you live?

A. Oh, about three blocks north, I guess.

Q. Calling your attention to six o'clock or later in the evening, where were you about that time?

A. I was at Pete Lee's pool room.

Q. What were you doing there Johnny?

A. Oh, I was in the living room visiting Robert Lee and his wife.

Q. How long did you stay at Pete Lee's pool room?

A. Oh, until about show time I think.

Q. What time would that be?

A. Oh, about 7:15 I guess.

Q. What time did you leave Pete Lee's pool room? A. 7:15 about.

Q. When you left Pete Lee's pool room would you state whether or not you passed the Kotzebue Grill? A. I did.

Q. When you came out of Pete Lee's pool room, could you see the Kotzebue Grill from Pete's?

A. Yes.

Q. When you then went to Ferguson's did you have to walk by the side of the Kotzebue Grill?

A. Yes, you have to.

Q. Now would you state whether or not any

(Testimony of Johnny Smith.)

part of the building known as the Kotzebue Grill was lit up, that lights were on?

A. Yes. The front part upstairs.

Q. Upstairs? A. Yes.

Q. Where were you when you first noticed the lights were on upstairs?

A. About under the building I guess.

Q. Right up to the building? [485]

A. Yes. Fifty feet from it I guess.

Q. When you walked by the building, which way did you turn? When you got to the front of the building. A. I turned left.

Q. That went toward the show house, did it?

A. Yes.

Q. Did you see lights at the front of the building? Will you state whether you saw any lights in the building from that end?

A. I just walked down there. It was so cold I was hurrying along.

Q. I mean did you see any lights shine out of the building from the front?

A. I imagine there would be lights because the same room is right there in front.

Q. The same room you saw from the side?

A. Yes. There are two more windows on the front.

Q. Did you see any lights on the ground floor in the kitchen? A. No.

Q. Now did you hear the fire bell ring, Johnny?

A. No, not right away.

Q. Where were you at the time of the fire?

(Testimony of Johnny Smith.)

A. I was at Ferguson's.

Q. Where. A. Ferguson's.

Q. How long after the fire started was it before you knew anything about it. [486]

A. I would say about five minutes I guess.

Q. What did you do after the fire started?

A. I didn't know what was happening. I went out and it was pretty dark. I seen people hurrying around and running around and I started going around where the fire was.

Q. Did you find out where it was?

A. Yes. They said it was upstairs where the supplies were. I didn't know exactly where though.

Q. What did you do, if anything, in regard to the fire, Johnny?

A. Oh, I don't know what to do for awhile. There was nothing to do, it was so dark. Pretty soon they started hauling water and I started helping them.

Q. You started carrying water right on the stairway there? Helped put the fire out?

A. Yes.

Q. Did you see Steve Salinas while you were there?

A. Oh, that was much later when the fire was under control.

Q. When the fire was under control?

A. Yes.

Q. Steve was up there?

A. Yes. I seen him.

(Testimony of Johnny Smith.)

Cross Examination

Q. (By Mr. Hermann): I hand you, Mr. Smith, plaintiff's Exhibit A-5 and ask you to point out where it was that you saw the light.

A. It was on the side there (indicating). [487]

Q. On the side? A. Yes.

Q. I believe there is a side picture here that will show that. Would it be one of these?

A. This one here.

Q. Will you point that out to the jury.

A. Exhibit A-1.

Mr. Taylor: Just a minute, Mr. Hermann, could I take a look to see where he saw the light.

A. The one on the far right (indicating).

Q. (By Mr. Hermann): When you were in front of the building could you still see that light?

A. Not from the ground.

Q. You couldn't see it from the front?

A. No.

Q. Now in the Grill, could you see any lights in the lower part of the front there? At this point here (indicating). I am pointing to A-5. Again, you couldn't see any light?

A. Not on the bottom there.

Q. Do you know whether there are any shades on those windows? A. I don't know.

Q. Is there usually?

A. I think so. I am not sure though.

Q. Could there have been a light on and you couldn't see it through the shades? [488]

(Testimony of Johnny Smith.)

A. Which one?

Q. You were referring to the bottom, the bottom part there.

A. No. There was no light.

Q. You didn't see any? A. No.

Q. Was there any particular reason you noticed these lights?

A. No. The only reason I noticed them, I started thinking how cold it was. There was a lot of frost on the window there.

Q. A lot of frost on the windows?

A. Yes.

Q. Would there be enough frost to block out the lights? A. No.

Q. Now do you base your time on the time the show started? A. Yes.

Q. What time does the show normally start in Kotzebue? A. 7:30.

Q. Does it start at 7:30 every night?

A. No.

Q. What nights doesn't it?

A. Except on Sundays.

Q. Any other night of the week?

A. Sundays and Wednesdays.

Q. What day was Christmas?

A. Thursday.

Q. What time does it start on Sundays and Wednesdays? [489] A. 8:15.

(There were no further questions and the witness was excused from the stand.)

Mr. Crane: If your Honor please, I believe

there are some matters I would ask to take up the Court, matters not connected with this case. May we excuse the jury.

The Court: Very well. It is about time for adjournment for the day. Also, we seldom attempt to hold court on Saturdays unless there is a grave emergency or counsel request it. A five-day week is supposedly a court week, so that we will continue this case then on Monday morning.

(The jury was then duly admonished and thereupon excused until the following Monday morning. Court remained in session for other business.)

Be It Remembered that at 10:00 a.m., Monday, April 28, 1958, Court reconvened, all persons necessary again being present.

The Court: Before proceeding with the trial, in the case of United States vs. Lee Andrew Williams, I should like to set for hearing Friday at 1:30 p.m. the motion of the defendant for judgment of acquittal. Friday, at 1:30. I appreciate the brief submitted by counsel and the copy to conform to our rules. Attorneys sometimes overlook that but it is very helpful to have copies.

We will proceed then with the case of United States vs. Salinas, the defendant being present.

(Both counsel then stipulated that the jury were all present.)

The Court: We will then proceed with the defense in the case.

CLARA SALINAS

is then called as the next witness for the defense and after being duly sworn testified as follows:

Direct Examination

Q. (By Mr. Taylor): Would you please state your name? A. Clara Salinas.

Q. So that the jury and court can hear, Mrs. Salinas, it will be necessary for you to talk fairly slow and speak up so that they can hear all your testimony. Where do you reside, Mrs. Salinas?

A. Kotzebue.

Q. How long have you resided there?

A. Since 1944, I believe. I don't remember. It was about '44.

Q. Prior to that, where did you live?

A. Selawik.

The Court: Would you permit an interruption. I notice that some of the jurors not engaged in this trial are here. Most of them know—but the jurors not engaged in this case need not report until Wednesday. They can be excused until Wednesday. You can check with us later, with the Deputy Clerk. Pardon the interruption. [491]

Q. (By Mr. Taylor): When you were living at Selawik, were you engaged in any business at that time? A. Yes.

Q. When did you first go into business?

A. In Selawik?

Q. In Selawik? A. Yes sir.

Q. When did you first engage in business at Selawik?

(Testimony of Clara Salinas.)

A. In the 1930s; since in the early 1930s. 1934, I believe it was.

Q. Was that with your former husband, Louie Rotman? A. Yes.

Q. What type of business was that, Mrs. Salinas?

A. General merchandise, the same as we are in now.

Q. Would that be hardware, groceries and so forth? A. Yes. Groceries—everything.

Q. Also a general store, is that right?

A. Yes.

Q. Then you say you moved to Kotzebue, is that right? In 1944? A. Yes.

Q. What did you do in Kotzebue?

A. We started up another store. We didn't exactly move. We kept the store in Selawik and started up another store in Kotzebue.

Q. Was it the same type of business, Mrs. Salinas? A. Yes.

Q. Do you now own a business in Kotzebue?

A. Yes.

Q. Do you own the building in which it is located? A. Yes.

Q. How big a building is that?

A. It's 40 x 100, two story.

Q. A two-story building? A. Yes.

Q. What business do you conduct in that?

A. General merchandise.

Q. That's hardware and various kinds of equipment and groceries, clothing and dry goods?

(Testimony of Clara Salinas.)

A. Yes.

Q. Do you also have a hotel or rooms in that building? A. Yes.

Q. Do you know the value of that building?

Mr. Hermann: I object, Your Honor. There is nothing to indicate that the Rotman store building is in any way material to the issues in this case.

The Court: I judge the purpose is to show comparative values of buildings in Kotzebue. If that is the purpose, it is permitted.

Q. (By Mr. Taylor): That's right. What would be the value of the building? Would you tell us, Mrs. Salinas, if you know.

A. The building?

Q. The building, yes. [493]

A. Well, between \$200,000.00 and \$300,000.00, I believe.

Q. Were you in Kotzebue at the time it was being built. A. Yes.

Q. Are you familiar with the values of property in Kotzebue? A. Yes. I should be.

Q. Now when did Mr. Rotman pass away?

A. 1955, March.

Q. You are now married to Mr. Salinas, Steve Salinas? A. That's right.

Q. Then since 1955 have you personally operated the business at Kotzebue and at Selawik?

A. That's right.

Q. In that operation do you order and have transported to Kotzebue various items that are or-

(Testimony of Clara Salinas.)

dinarily sold in general stores? A. Yes.

Q. You are familiar then with prices, and do you have access then to catalogues that give the values of various things that you handle?

A. Yes.

Q. Now calling your attention to around in December of 1957, do you know of your own knowledge what restaurant equipment was contained in the Kotzebue Grill? Had you been in that place a considerable number of times? A. Yes.

Q. Before I proceed any further, I would like to ask you one question. Have you had occasion to purchase and install restaurant equipment in any buildings of your own? [494] A. Yes.

Q. Do you have a restaurant now in Kotzebue?

A. Yes.

Q. You are familiar with prices of restaurant equipment? A. Yes, I should be.

Q. Now, referring back to the Kotzebue Grill in the month of December, 1957, could you give, do you have an opinion as to the value of the restaurant equipment only, in that building? Just say yes or no, if you have an opinion.

A. Yes.

Q. What is that opinion as to the value of the restaurant equipment contained in the Kotzebue Grill on or about the 25th day of December, 1957.

A. The value of the equipment only?

Q. That's right.

A. I would say \$15,000.00, between \$15,000.00 and \$16,000.00.

(Testimony of Clara Salinas.)

Q. Between \$15,000.00 and \$16,000.00?

A. Something like that.

Q. Now Mrs. Salinas, do you know approximately the amount of meat and groceries that was on hand at the Kotzebue Grill on or about that day? A. Meat and groceries?

Q. Yes, meat and groceries.

A. In the restaurant, you mean?

Q. Yes.

A. It should be a couple of thousands of dollars worth.

Q. About two thousand dollars?

A. Yes sir. [495]

Q. Now did you, as a purchaser of groceries—you say you had purchased for your store, your own store—did you purchase any supplies or groceries for the Kotzebue Grill? A. Yes, I did.

Q. Did you have any groceries or supplies stored in your place on the 25th day of December?

A. Yes sir.

Q. About what was the value of those groceries?

A. Between six and seven thousand dollars.

Q. Now in reference to the building itself, Mrs. Salinas, the building known as the Kotzebue Grill, would you have an opinion as to the value of that building? A. The value of the building?

Q. Yes.

A. With the equipment and everything?

Q. No. You have already testified as to the value of the equipment in there, but as to the building itself? A. \$25,000.00.

(Testimony of Clara Salinas.)

Q. Is that based on your knowledge gained through real estate transactions at Kotzebue?

A. That's right.

Q. And your own building experience?

A. That's right.

Q. So then you say the value of the building would be \$25,000.00, I believe you testified. There would then be about \$8,500.00 or \$9,000.00 in groceries and \$15,000.00 to \$16,000.00 in restaurant equipment. Is that [496] about right?

A. That's right.

Q. Now Mrs. Salinas, coming back to the 25th day of December, 1957, taking from approximately noon of that day on, would you state what was the first time that you saw Mr. Salinas on that day, if you did see him?

A. Approximately what time was it?

Q. Yes.

A. It was around noon. Between twelve and one.

Q. Where did you first see him?

A. In the apartment.

Q. I believe you have some children, have you, Mrs. Rotman I mean Salinas. Pardon me.

A. Yes.

Q. And they are children by your previous marriage? A. That's right.

Q. Were they living with you at Kotzebue at that time? A. No.

Q. Were any of them living there?

A. No.

(Testimony of Clara Salinas.)

Q. Had any of them been living previously with you? A. Yes.

Q. Do you know where Mr. Salinas was living at that time, that is referring to December 25, 1957? A. In the hotel.

Q. In your hotel? [497]

A. Yes. That's right.

Q. What room, if any, was he occupying?

A. It was an unnumbered room. It was next to seven. It belonged to one of the girls.

Q. It belonged to one of the girls? One of your girls? A. Yes. It wasn't numbered.

Q. It had no number—then what room was it?

A. Well, it was next to seven.

Q. Next to seven? A. Yes.

Q. So then you saw Mr. Salinas around noon. And did he come to your apartment at that particular time? A. Yes.

Q. Then what did you do?

A. Well, we had coffee first, and we had breakfast.

Q. Did anybody else come to your apartment then or shortly after?

A. Not just then. But Mr. Amundsen was in there around 2:00.

Q. Who?

A. Mr. Amundsen, Jerry Amundsen.

Q. Who was Mr. Amundsen?

A. He was manager for Wien at the time.

Q. How long did he stay?

A. He didn't stay very long. He had a dinner

(Testimony of Clara Salinas.)

date I believe. Around 2:00 or shortly after.

Q. You say he stayed until 2:00? [498]

A. Yes.

Q. What did Mr. Amundsen do, if anything, while he was at your apartment?

A. He and Steve played crib for a little bit.

Q. And then he had a dinner engagement and he left? A. Yes.

Q. Then, following Mr. Amundsen's departure, what did you and Mr. Salinas do then?

A. Well, about three we started dinner, cooking dinner.

Q. What did you first do to start that dinner?

A. Well, we had to go downstairs and get the groceries.

Q. What groceries did you get downstairs, Mrs. Salinas?

A. Well I had a duck thawing out, and well, vegetables, like potatoes and everything. I had to get a pot of water, drinking water.

Q. What, if anything, did Mr. Salinas do while you went down to get the groceries?

A. Well, he came down and helped me carry them up.

Q. About what time was it that you got these groceries and the water and the duck back up to your apartment? A. It was around three.

Q. About three? A. Yes.

Q. Then what did Mr. Salinas do?

A. Well, he started preparing the duck and I started the vegetables and mixed a cake. [499]

(Testimony of Clara Salinas.)

Q. Did you mix up a cake? A. Yes.

Q. Mr. Salinas was fixing the duck?

A. Yes.

Q. In what way was he preparing it?

A. Well, he was preparing the dressing.

Q. He made the dressing and got it ready to roast, is that right? A. Yes.

Q. Was that a local duck or was that a duck brought in from the States?

A. A duck brought in from the States.

Q. So then after you had made this cake and Mr. Salinas had got this duck all prepared for roasting and put the dressing in, approximately what time was it?

A. It was almost four o'clock by that time.

Q. What time did you put the duck in the oven, you or Mr. Salinas?

A. It was just a little before four o'clock, I believe.

Q. Then what time did you have dinner that afternoon?

A. It was around six, or a little after, that evening.

Q. Now during the period between four o'clock and six o'clock that evening, where was Mr. Salinas? A. He was in the apartment there.

Q. What was he doing?

A. Well not much. We didn't do anything but wait for dinner to cook.

Q. Was any other company there during that two hour period? [500]

(Testimony of Clara Salinas.)

A. No. Mr. Amundsen was in there, I believe.

Q. I didn't get that last remark.

A. Mr. Amundsen did come back after he had his dinner date. I believe it was about that time that he came back, and they played crib for awhile again.

Q. That would be the second time that they played crib that day. Is that right? A. Yes.

Q. Was that while dinner was being prepared?

A. While it was cooking, yes.

Q. Then during that two hour period was Mr. Salinas in the apartment at all times?

A. Yes. As far as I know. I didn't see him leave the apartment.

Q. Then after you had—you say you ate about six o'clock, is that right? A. Yes.

Q. About what time did you finish your dinner?

A. Well, it was about seven, I believe, by the time we finished.

Q. And then after having your dinner, what did you do?

A. Oh, we cleaned up and sat around.

Q. By cleaning up, what do you mean?

A. Well, cleaned up the kitchen and did the dishes.

Q. Then you say you sat around. Did any company come after dinner?

A. Well, Mr. Amundsen was in and out of there all the time.

Q. Did he live in the hotel?

A. No, he didn't. [501]

(Testimony of Clara Salinas.)

Q. Then when was the last time that Mr. Amundsen left? A. I didn't get that.

Q. You say Mr. Amundsen was in and out a couple of times. When was the last time that he left? A. That he left?

Q. That he left, yes.

A. It was sometime around 8:00 or a little after, or something around there.

Q. Then after Mr. Amundsen left, what did you do? What did you and Mr. Salinas do?

A. We didn't do anything. We just sat around in the front and drank coffee.

Q. Did you have anything to eat after you had cleaned up?

A. We had some cake. We had some cake with our coffee.

Q. Then did anything unusual occur after you had finished dinner and had cleaned up the place, washed the dishes and had some cake and coffee again? A. No.

Q. Did you hear any commotion outside of your place?

A. Oh. You mean when they came to tell Steve about the fire?

Q. Yes. Just explain what happened.

A. Some girl came running in the building and hollared to Steve that his restaurant was on fire.

Q. What did Steve do?

A. Well, he went to get dressed. He got his boots and parka.

Q. By boots—what kind of boots were they?

(Testimony of Clara Salinas.)

A. His over-boots.

Q. How was Mr. Salinas dressed for dinner and after dinner. What type of clothing was he wearing?

A. Well, he had slacks on and a white shirt and a tie—the way he always dresses.

Q. Was he dressed up with good clothes, nice clothes? A. Yes.

Q. Like he is dressed up now? A. Yes.

Q. Did he change or attempt to change any of those clothes that you know of before he went to the fire? A. No.

Q. Just put on his over-boots and parka and left, is that right? A. Yes.

Q. How long was he gone at that time, Mrs. Salinas?

A. Oh, he was gone for quite awhile. He was gone quite awhile. I went to bed about a couple of hours after he left. I sat up awhile.

Q. You are positive then, Mrs. Salinas—are you positive that between approximately noon on the 25th day of December, 1957, up until approximately 11:00 o'clock of that evening, that Mr. Salinas was in your building, in the upstairs part of the Rotman building? A. Yes.

Q. Do you remember how the weather was that day, Mrs. Salinas, as to temperature?

A. It was very cold, a cold day, a very cold day.

Q. Do you, by any chance, remember anything as to how cold it did get that day?

A. It must have been close to forty (below), one of the coldest days we had.

(Testimony of Clara Salinas.)

Mr. Taylor: Can I have just a minute, your Honor?

The Court: Yes, very well.

Mr. Taylor: No further questions.

Cross Examination

Q. (By Mr. Hermann): Mrs. Salinas, you testified that you knew what restaurant equipment the Kotzebue Grill actually contained, is that true?

A. That's right.

Q. How many times had you been over to the Kotzebue Grill in the month preceding the fire?

A. Preceding the fire?

Q. Yes.

A. Oh, I don't—I can't say how many times I have been there. Quite a few times.

Q. Do you know whether the equipment was new or used?

A. Whether it was new or used?

Q. Whether it was new or used equipment.

A. Well, it was all used.

Q. Do you know how old it was?

A. Well, some of it was stuff that was there when Steve bought the place.

Q. Was it new or used at the time he bought it?

A. A lot of it was new, quite new. [504]

Q. Do you know how old, say, the ice cream freezer was? A. The ice cream freezer?

Q. Yes. A. Well——

Mr. Taylor: If your Honor please, I don't believe there was any testimony as to any ice cream freezer being in there. I think——

(Testimony of Clara Salinas.)

Mr. Hermann: This is cross examination.

The Court: There was some evidence previously to the effect that you asked about equipment generally. I think it is proper cross examination to ask about it particularly.

Q. (By Mr. Hermann): Do you know how old that equipment was?

A. It probably was about four years old, something like that.

Q. At the time he bought the Grill?

A. Yes.

Q. Do you know what kind of condition these various items of equipment were in? A. Yes.

Q. Were they all in good condition?

A. Yes.

Q. Were they as good as new?

A. Not as good as new, probably, but they were usable.

Q. Well, as to your value put on them, \$15,000.00 or \$16,000.00, how do you base that? Was that their value when new, or the cost to replace them, [505] or their value as used, or what was that?

A. I figured on what they were worth at the time.

Q. At the time of the five? A. Yes.

Q. Was that their own value or the cost to replace them? A. Their own value.

Q. Their own value. Now did you figure that out item by item? A. Yes.

Q. You have figured it out item by item?

A. Yes.

(Testimony of Clara Salinas.)

Q. Where would you get a value to figure it item by item? Where would you start?

A. How do you mean?

Q. Would you depreciate them or use the value of the comparatively new article? A. Yes.

Q. A comparatively new article? A. Yes.

Q. Your value would be really what it costs now to replace them? A. No, not necessarily.

Q. Yet you used the figures for a new item today, did you?

A. Yes. I compared with a new item today.

Q. Looked it up in the catalog, did you?

A. Yes, some of it.

Q. Then you figured in what it would cost to put the article in there [506] today, the value it has today, wasn't it?

A. No, not necessarily.

Q. Well, did you take the new value and reduce it any? A. Yes.

Q. How much?

A. About 20% or something like that.

Q. Do you know how many groceries might have been stored upstairs in the Kotzebue Grill?

A. Approximately about a thousand dollars' worth.

Q. Upstairs? How many downstairs?

A. Well, that's altogether.

Q. Altogether, upstairs and downstairs? About a thousand dollars?

A. Well, the meat was about a thousand dollars too. That was in the back.

(Testimony of Clara Salinas.)

Q. One thousand dollars then for the meat, and one thousand dollars for groceries? A. Yes.

Q. You say that Steve had between \$6,500.00 and \$7,000.00 worth of groceries at your place?

A. Yes.

Q. How do you know that he had that much, that value of groceries?

A. Well, I knew just about how much he ordered and how much he had taken out.

Q. When did that order come in?

A. On the boat. [507]

Q. What year was that? '56 or '57? A. '57.

Q. '57? A. Yes.

Q. What was the total amount in '57 that he received through you?

A. It was about \$10,000.00, a little bit more, I think.

Q. What month did that boat come in?

A. That was the first boat that came in. That would be July, I believe.

Q. That's the customary month for the boat, isn't it? A. Yes.

Q. Now have you been previously interviewed by Marshal Oliver? A. Yes. Several times.

Q. And Mr. Adirim? A. Yes.

Q. Also Mr. Harkabus? A. Yes.

Q. Did you tell them that you had no knowledge of the Grill inventory? A. I don't remember.

Q. Could you have told them that?

A. I don't remember if I did.

Q. Now you stated a girl came and notified you

(Testimony of Clara Salinas.)

of the fire. Do you know the name of that girl?

A. It was Nannie Howarth.

Q. Was there any other girl that came later?

A. There was some other kids that came later on, but I don't just remember [508] what their names were.

Q. Was it very much later? A. No.

Q. How were you dressed at the time they came?

A. Oh, I was fully dressed yet.

Q. You weren't in your bathrobe when the second girls came? A. The second girls?

Q. Not the first one, but when the others came later.

A. I think there were a couple of boys came to get some CO-2 fire extinguishers, and I probably was in my bathrobe then.

Q. That was shortly after Steve left?

A. It was quite awhile afterward I guess.

Q. Well, hadn't you retired to your room while Mr. Amundsen and Steve were playing cribbage?

A. No, I wasn't in bed.

Q. Were you in your room?

A. I was in and out of my room and in the kitchen.

Q. Now which room were you and Steve in when the girl came to tell about the fire?

A. The front room.

Q. Were the lights on in there?

A. Oh yes.

Q. When you talked to the marshals on the investigation previously, did you tell them that Steve

(Testimony of Clara Salinas.)

could have been gone without your knowing it?

A. I don't remember; I might have. [509]

Q. Do you think he could have been gone without your knowing it? A. I don't think so.

Q. It's possible though?

A. No. Because I was up there all the time he was there. I didn't see him leave.

Q. Could he have gone out for ten or fifteen minutes at that time without your knowing it?

A. I don't know. I am sure he didn't.

Q. Was Steve in the custom of buying groceries from Rotman's for his restaurant before the fire?

A. Yes.

Q. Now these supplies he ordered through you, where were they kept?

A. They were stored in the basement. The warm storage was, the case stuff.

Q. The basement of the store? A. Yes.

Q. Now when those groceries were taken out to the Grill did he pay for them at the time?

A. Yes.

Q. Did he pay for them at the time he took them? A. Yes.

Q. What price would he pay for them, wholesale or retail?

A. We gave him a deduction of 10%.

Q. They were billed to you were they?

A. Billed to me. [510]

Q. Yes. From the wholesale house. A. Yes.

Q. They were on your books, were they?

A. Yes.

(Testimony of Clara Salinas.)

Q. As he would need them he would take them out and pay for them, is that correct?

A. That's right.

Q. Those were really your groceries?

A. Yes.

Q. That includes this \$6,500.00 worth of groceries? A. Yes.

Q. Did you sell meat to him regularly?

A. Yes.

Q. Did he buy most of his meat from you or just part of it?

A. He bought most of it from me.

Q. When did Steve come back from the fire, about what time?

A. It was quite late; I was already in bed.

Q. Did he tell you anything about the fire when he got back? A. Yes.

Q. Did he tell you how it started?

A. No. I didn't question him.

Q. No further questions.

Redirect Examination

Q. (By Mr. Taylor): Mrs. Salinas, Mr. Hermann questioned you in regard to these groceries ordered. I would like to ask you how many boats a year do you have at Kotzebue [511] from the States? A. Only 1.

Q. Only 1? A. Yes.

Q. When you place your grocery orders to come on that ship—you say it got in about August—July or August 1957? A. Yes.

(Testimony of Clara Salinas.)

Q. Did you make up your order for your store?

A. That's right.

Q. And then how did you handle Mr. Salinas' order?

A. Well, I asked him just what he needed and he gave me an idea, so I just added that to my own grocery order.

Q. You added that to yours? A. Yes.

Q. Around \$10,000.00? A. Yes.

Q. That's all, Mrs. Salinas.

(There were no further questions and the witness was excused from the stand.)

(At this time, 10:50 a.m., court recessed for approximately ten minutes, the jury being first duly admonished.)

After Recess

(At 11:00 a.m. court reconvened and the trial of this cause was resumed, all persons necessary being again [512] present. Both counsel stipulated as to the presence of the jury.)

JACK O. JONES

was then called as the next witness for the defense and after being duly sworn testified as follows:

Direct Examination

Q. (By Mr. Crane): Will you state your name, please. A. Jack O. Jones.

Q. Where do you reside?

A. Kotzebue, for about pretty close to ten years.

(Testimony of Jack O. Jones.)

Q. What has been your usual occupation in Kotzebue the biggest part of the last ten years?

A. Well, I work for Mr. Ferguson.

Q. In what capacity?

A. Well, Clerk and Acting Manager.

Q. In other words, you run the Ferguson store at Kotzebue? A. That's right.

Q. Does the Ferguson store at Kotzebue handle a commodity known as outboard motors?

A. Yes.

Q. Do you remember during the last year or the last two years, just roughly, approximately how many outboard motors have you sold in that one store?

A. If I remember right I probably sold about a hundred, or a little more than a hundred.

Q. That's from the one store? [513]

A. Yes.

Q. Now do the other stores sell outboard motors?

A. Yes. Hansen's store.

Q. Does Bullock also sell them? A. Yes.

Q. Just as a rough estimate then, about how many outboard motors are there up and down the beach at Kotzebue there?

A. Probably around three hundred I think, or more.

Q. Around three hundred? A. Yes.

Q. What kind of fuel do these outboard motors burn? A. They use regular motor gas.

Q. Now is anything mixed with that motor gas?

A. Yes.

(Testimony of Jack O. Jones.)

Q. What is mixed with it?

A. It's mixed with zerolene No. 30 or No. 40.

Q. Just explain what you mean by zerolene?
That's a lubricating oil is it? A. Yes.

Q. By the way, do you have an outboard motor also, of your own? A. Yes, that's right.

Q. What is the ratio of the mixture of gasoline and oil for outboard motors?

A. A pint to every gallon. In other words a quart to a six gallon tank.

Mr. Hermann: If your Honor please, I would like to have [514] the testimony stricken as immaterial. I thought for awhile they were going to relate it.

Mr. Crane: If your Honor please, we will definitely connect it up.

The Court: Very well. With that assurance the motion will be denied.

Q. (By Mr. Crane): Mr. Jones, does the amount of zerolene to the amount of gas depend on the size of your motor? A. No, not properly.

Q. All motors use the same mixture? Little motors as well as big motors?

A. A 30 motor will use the same mixture as a 10 horse motor.

Mr. Hermann: No questions.

The Court: That's all then, Mr. Jones.

(There were no further questions and the witness was excused from the stand.)

WILL M. GILLIS

is called as the next witness for the defense, and after being duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Taylor): Will you state your name, please? A. Will M. Gillis.

Q. Where do you reside, Mr. Gillis? [515]

A. Here in Nome.

Q. How long have you lived in Nome?

A. Nearly 14 years now.

Q. What is your business or profession or occupation? A. Carpenter.

Q. As a carpenter do you also engage in contracting? A. I do.

Q. How long have you been engaged in carpentering, Mr. Gillis?

A. Practically all my adult life.

Q. Have you ever made an appraisal or estimate as to the cost of building buildings, or the cost of buildings already built? A. I have.

Q. Then you feel that you are capable of making an inspection of a building and ascertaining from that inspection the cost of replacement or the cost, the original cost of the building?

A. Reasonably so, yes.

Q. Mr. Gillis, have you had occasion at the request of the Government to make an inspection and examination of a building at Kotzebue known as the Kotzebue Grill? A. I did.

Q. When did you make that inspection?

A. Oh, possibly two weeks ago; I couldn't say the exact date.

(Testimony of Will M. Gillis.)

Q. You don't remember the exact date?

A. No, I don't know for sure, possibly two weeks ago, maybe three.

Q. How long—— [516]

A. Say—I do remember the exact date. I was there on Easter Sunday.

Q. How long did you take in examining that building, Mr. Gillis?

A. Well, I went to Kotzebue on the Wien plane Saturday morning and came back from Kotzebue Monday morning on the Wien plane. I was through the building two or three times checking it over. I looked it over, measured it, and that was all I was there for, was to look at the building.

Q. Just how did you proceed to make an examination of that building, Mr. Gillis?

A. I don't believe I understood.

Q. What did you do with regard to examining that building to ascertain its cost?

A. I went through the building. I checked from the outside and went through the building, top and bottom, and looked it all over, and figured approximately what it would take to replace the building.

Q. Did you go into the attic? A. I did.

Q. Did you see what type of material, the dimensions, the rafters, were?

A. Approximately, yes.

Q. And the ceiling joists in the attic?

A. That's right.

Q. Did you see the ceiling joists of the second floor? A. Yes.

(Testimony of Will M. Gillis.)

Q. And the studding, the size of the studding?

A. That's right.

Q. And the foundation timbers? [517]

A. Approximately, yes. I couldn't get under the building. Where the building was sitting at that time I couldn't get under the building.

Q. Then, you say about three times, two or three times you were in that building looking it over?

A. Yes, I must have been in the building at least that number of times, and I checked the outside several more times.

Q. What?

A. I checked the outside of the building several more times, but I guess I was in the building three times, probably.

Q. Now from your examination of that building that you have described and from what you know of prices, have you an opinion as to the replacement cost of that structure? A. Yes.

Q. You do have?

Mr. Hermann: I object, your Honor. The actual value of the building wasn't at issue, and we are dealing with the insurance value.

The Court: We had testimony from Mr. Harkabus, it is true, on insurance value, or the replacement cost less depreciation. He also testified replacement cost depends on several factors, including the original cost. So the objection must be overruled.

Q. (By Mr. Taylor): Then you do have an opinion as to the approximate replacement cost?

(Testimony of Will M. Gillis.)

A. I do.

Q. Mr. Gillis, will you tell the Court and jury what you believe would [518] be the reasonable replacement cost of that building?

A. Taking into consideration freight and light-erage rates, and labor rates, and the location, it's my approximate estimate that it would be about \$58,000.00.

Q. Mr. Gillis, when you were making an examination of this building to ascertain the value of it, the replacement value, did you have occasion to examine the attic? A. I did.

Q. And did you see, did you inspect the damage that had been caused by the fire?

A. I saw it, yes.

Q. From your examination or your seeing that particular damage, would you have an opinion as to the extent of that damage in dollars?

A. The damage to the building in dollars I wouldn't think would be over a thousand dollars or fifteen hundred dollars.

Q. And you, as a carpenter or builder, would be able to repair that damage for that sum?

A. I think so.

Q. Now Mr. Gillis——

The Court: At this point, Mr. Taylor, before you proceed to some other inquiry, pursuant to objection recently made, it would be necessary to show not only the replacement cost, but the depreciation deducted from that to arrive at the insurable value, which is an issue here. Do you propose to show

(Testimony of Will M. Gillis.)

depreciation? Mr. Taylor, do you propose to show that then? Otherwise it would [519] not be wholly material here unless there be deducted from the replacement cost the depreciation or use. That is the insurable value. Unless that is shown I must hold that this testimony is not material or competent.

Q. (By Mr. Taylor): Now Mr. Gillis, that \$58,000.00 would be the replacement value. Do you have an opinion as to the value, that is, taking into consideration the depreciation of that building.

A. I wouldn't know that for sure because I don't know how old the building is.

Q. Now if the evidence shows the building is thirteen years old would you be able to state what the insurable value of that building would be?

A. That would be a hard thing for me to do. Does the depreciation of the value of a building go over a period of years or does it only go for ten years? I am asking.

The Court: Well depreciation, of course, depends, of course, in part as to the number of years and the age of the building. But you should be in a position to judge what rate of depreciation should be used for that type of building.

A. That would be hard for me to do, and I don't know the exact age of the building.

The Court: Assuming that the age is thirteen years, an assumption that counsel asked you. How much would you figure the depreciation on it over that period.

(Testimony of Will M. Gillis.)

A. Ordinarily you only allow a certain percentage of the cost as [520] depreciation per year.

The Court: I cannot testify. The depreciation should be shown by some means.

Q. (By Mr. Taylor): If you were to take 5% per annum as depreciation, would you be able to figure it?

A. If I knew the original cost of the building.

Q. Assuming that \$58,000.00 being the original cost.

A. That could be figured from there.

Q. Using those figures what would you think would be the insurable value?

A. There again it would be hard for me to say. 5% of \$58,000.00 deducted each year over that period, you would come up with a certain figure. I couldn't tell you off-hand. I am not a good enough mathematician to tell you that off-hand.

Q. Well, using that formula there would be a depreciation of \$2,400.00 the first year, and in——

The Court: \$2,400.00?

Mr. Taylor: I think so, your Honor.

The Court: I get \$2,900.00. 5% of \$58,000.00.

Mr. Taylor: Yes, \$2,900.00, your Honor.

Q. (By Mr. Taylor): Then, assuming, Mr. Gillis, that 5% would be \$2,900.00 per year, what do you believe the depreciation would be over 13 years?

A. Your depreciation would have to be worked down from that value. [521] The second year it wouldn't be as much as it would the original year, because you have already \$2,900.00 deducted. It

(Testimony of Will M. Gillis.)

would be \$58,000.00 minus \$2,900.00 at 5%.

Q. Then the next step would be 5% of \$58,000.00 less \$2,900.00? A. I would think so.

Q. Say we took the full \$2,900.00 or \$2,400.00 over a period of 13 years. Do you know how much that would be?

A. Well, it would be thirteen times \$2,900.00. I am getting confused now.

Q. I believe the first yearly depreciation would be \$2,400.00.

The Court: 5% of \$58,000.00 is \$2,900.00 according to my arithmetic.

Mr. Hermann: I have \$2,400.00 also.

The Court: Somebody needs to learn arithmetic. 5×8 is 40, and 5×5 is 25, plus 4 is 29. That's the only arithmetic I know.

Mr. Taylor: That's right.

Q. Well, isn't it a fact, Mr. Gillis, if we took the full \$2,900.00 each year there would be a depreciation of \$37,700.00?

A. I assume there would be.

Q. So the insurable value then would be \$58,000.00 less \$37,700.00? Is that right?

A. I believe so.

Q. Now would the fact that a going business in such a building, that would also affect the valuation, would it not? [522]

A. I don't believe I understand your question.

Q. A profitable business operated in a building such as that would be also a factor to be taken into consideration, and also the future life of the building? A. I suppose so, yes.

(Testimony of Will M. Gillis.)

Mr. Taylor: If your Honor please, I will have a witness to testify as to this actual depreciation and the value of the building later. But I would like to continue with Mr. Gillis on another matter.

The Court: Yes, very well.

Mr. Taylor: Would the Clerk please mark this for identification.

(A box containing sawdust is marked for identification as defendant's Exhibit No. 12.)

Q. (By Mr. Taylor): Mr. Gillis, I hand you defendant's identification No. 12, which is a box containing a substance. Would you state what that substance is?

A. It is a coarse type sawdust.

Q. Where did you get that sawdust, Mr. Gillis?

A. I received it from Wien Airlines.

Mr. Taylor: We would like to have this marked for identification, Mr. Clerk.

(A document is marked for identification as defendant's Exhibit No. 13.) [523]

Q. (By Mr. Taylor): I now hand you defendant's identification No. 13 and ask you to state, if you can, what that is.

A. Well, this is the waybill for the box of material that I received from Wien Airlines, as I understand, when it was sent down from Kotzebue.

Q. Where did you get this box?

A. I picked it up at Wien Airlines office.

Q. And this is the waybill for that?

A. That's right.

Q. Where did you get this waybill?

(Testimony of Will M. Gillis.)

A. At Wien Airlines.

Q. At whose request did you pick that exhibit up?

A. Mr. McNees had told me. Mr. Crane, I think, had told him to contact me when it came in.

Mr. Taylor: If your Honor please, we would like to offer this waybill and sawdust, this coarse sawdust, in evidence.

The Court: The source will be connected up?

Mr. Taylor: There is a witness on the plane coming down this morning. The plane of this witness is expected momentarily.

Mr. Crane: The plane is expected anytime.

The Court: With the assurance that it will be connected up, it may be received. Both the box and the waybill.

Mr. Hermann: Objected to, subject to being connected up.

(Defendant's identifications 12 and 13 are received in evidence.) [524]

Q. (By Mr. Taylor): Mr. Gillis, at the time you received that box, was there any more sawdust in it than at the present time?

A. Yes. The box was full, practically full.

Q. Then pursuant to request by defense counsel did you make any tests regarding the ignition of that sawdust or parts of it? A. Sir?

Q. Did you make any tests regarding the ignition of that sawdust? A. I did.

Q. How many tests did you make, Mr. Gillis?

A. Well, we made five at least.

(Testimony of Will M. Gillis.)

Q. Would you state just what those tests were, what was done preceding the tests, and how the test was conducted and the result?

A. Well, the first test we made we took a pile of sawdust and turned a flame from a presto-lite torch into it. The second test we took a pile of sawdust and connected up a soldering iron and put it into the sawdust.

Mr. Taylor: I don't believe this was marked for identification. We would like to have the Clerk mark this soldering iron for identification.

(A soldering iron is then marked for identification as defendant's Exhibit No. 14.)

Q. (By Mr. Taylor): I hand you plaintiff's (defendant's) identification No. 14 and ask you if that is the soldering iron which you used in test No. 2? [525] A. It is.

Q. Then how did you make that test, Mr. Gillis?

A. We took a pile of sawdust and connected the iron up, placed it in the sawdust, covered it over, and let it go to see what would happen.

Q. Did you turn the juice on, the electricity on?

A. Yes sir.

Q. Now you used the word "we." Was anybody else present at the time those tests were made?

A. Mr. Norvin Lewis was present when I made them.

Q. Now how long was test No. 2 continued?

A. The test with the iron?

Q. Yes.

A. I think that was approximately 55 minutes, although he kept the exact time; I didn't.

(Testimony of Will M. Gillis.)

Q. You think it was approximately 55 minutes?

A. Yes.

Q. What was the result of that test?

A. You got a charring action started in the sawdust but no blaze.

Q. What was the atmospheric condition at the place that you conducted that test?

A. Well, the doors were open, plenty of air and pretty breezy, no shortage of air or circulation as far as that goes. Some were conducted outdoors; some indoors.

Q. How was test No. 2 conducted?

A. It was conducted indoors. [526]

Q. You say all you got was a charring action?

A. That's right. That's all we got from it at all.

Q. Test No. 3, what was test No. 3?

A. In test No. 3 we took a pile of it and poured a mixture of gas and oil over it and touched a match to it.

Q. What was the result of that test?

A. After all the fumes of gas and oil burned out the flame went out. The charring action was still there but the flame went out.

Q. Was any of the sawdust consumed?

A. Some of it was; some of it wasn't. There was considerable of the original sawdust that was put there that was untouched. Quite a little bit of it. It was mainly burned on top. Down below an inch and a half deep it wasn't charred at all.

Q. And then test No. 4. How was that conducted, Mr. Gillis?

(Testimony of Will M. Gillis.)

A. In test No. 4 we took a pile of sawdust and poured a can of lighter fluid over it.

Q. Lighter fluid I believe is highly volatile, is it not? A. I think so, yes.

Q. Under what atmospheric conditions?

A. That was conducted outdoors.

Q. That was conducted outdoors. What burning action did you get from that?

A. Well, again we got fumes that burned off. As soon as the fumes of the lighter fluid had burned, the blaze goes out and the charring action stays there. It burns like a punk, but again it only burns on the top. It only [527] burned down an inch or an inch and a half, but it only burned on the top.

Q. In none of these tests so far was there any continuous burning of the sawdust after you took the heat from it?

A. No. The sawdust would go ahead and burn like punk, but there was no blaze.

Q. It would smoulder, is that it?

A. It would smoulder slowly.

Q. Then test No. 5, by what method was that test conducted?

A. In No. 5 we took blazo and poured the blazo directly over it and touched a match to it.

Q. What happened?

A. We got practically the same action that we got with the lighter fluid. As soon as the fumes burned off the blaze goes out and you have a charring on top, but it doesn't go very deep.

(Testimony of Will M. Gillis.)

Q. Now what tests did you make, if any, as to odors remaining after you had the blazo, the lighter fluid and the mixture of oil and gas?

A. The blazo and lighter fluid we couldn't detect any odor after the blaze had gone out. The mixture of oil and gas after the fumes had gone out you could detect the odor of the oil there.

Q. Was that the only test in which you could detect the odor of oil?

A. That was the only thing there on what we tried. We couldn't detect the gas or blazo or lighter fluid.

Q. I believe you testified that the first—was it the first test you tried for 55 minutes?

A. No, the second. We tried with the iron for approximately 55 minutes. [528]

Q. And then in the third test, was the iron used?

A. No. The third test was with the gas and oil mixture and that only continued as long as there was any flames from the oil and gas mixture, as long as there was oil and gas fumes there apparently. As soon as that was burned off the flames died off.

Q. Do you remember how long that took, Mr. Gillis?

A. Oh, I couldn't say off-hand. Mr. Lewis, as I said, kept the time on that. I didn't pay too much attention to the exact time it took to burn off. It took the oil and gas longer to burn off than either the lighter fluid or blazo, and it burned with more of a smoke to it. It didn't burn as clean.

(Testimony of Will M. Gillis.)

Q. Then was the lighter fluid and blazo just straight, is that right? A. That's right.

Q. Do you remember how long each one of those tests took?

A. No, I couldn't say exactly. It doesn't take very long to burn off gas though or blazo, either one. Maybe they burnt for 20 minutes, maybe a half hour. Again, if you would ask Mr. Lewis—he was keeping the time. I was interested in the action, what happened, and the degree the fumes had burnt off, so I didn't keep the time exactly.

Q. Now, Mr. Gillis, did you have an opportunity to inspect that attic in the vicinity of where the fire took place? A. I did.

Q. Would you state whether or not you noticed in the attic a bulkhead, the attic bulkheaded off?

A. I did.

Q. In your opinion, Mr. Gillis, would a fire, if started by human actions [529] do you think that would be the most logical place in which to start a fire to burn a building down.

A. Well, it wouldn't be my opinion that it would.

Mr. Hermann: If your Honor please, I object. This would not be the type of opinion Mr. Gillis is qualified to make. In fact it is in the realm of conjecture. Surely he is not qualified in the realm of fire inspection or causes of fires, and therefore it would be purely conjecture.

Mr. Taylor: If your Honor please, I was thinking this way: that if you say this was set by human hands——

(Testimony of Will M. Gillis.)

The Court: The problem is as to whether or not the witness may give an opinion on a matter on which he is not qualified as an expert. An opinion can be given only by one so qualified in that particular field.

Q. (By Mr. Taylor): Mr. Gillis, how big an area was it from the bulkhead to the end of the building? A. Oh, probably 16 feet.

Q. Was that a solid bulkhead?

A. Yes. Apparently it had been built in there pretty solid.

Q. Then the area to which the fire would have immediate access would be about 16 feet in width?

A. I would think so, yes. I don't remember the exact figure.

Q. About what length?

A. About approximately 20 or 22 feet, in that direction. [530]

Q. From your inspection, what was the area of the burning?

A. You mean in that one location?

Q. Yes.

A. It was charred and smoked pretty well over most of the location.

Q. Were some of the rafters burned through?

A. They were charred.

Q. Now, Mr. Gillis, I hand you plaintiff's Exhibit G-7 and ask you to state if that would correctly depict that attic as you saw it?

A. I would think so. Pretty much, yes.

Q. I will hand you Exhibit G-4 and ask you to

(Testimony of Will M. Gillis.)

state whether or not that correctly depicts it?

A. Yes, I would imagine it would.

Q. Then I will also hand you G-3, plaintiff's Exhibit G-3, and ask you to state if that correctly depicts the condition of the attic after the fire?

A. I would think it did pretty much.

Q. Now calling your attention to G-7, would you point out to the jury—just hold this up like this, Mr. Gillis—and state what this purports to show.

A. I think that shows the sawdust there, doesn't it.

Q. Burned or unburned?

A. To me it would be unburned.

Q. Now Mr. Gillis, from your observation of the damage done in that attic and your knowledge of burning, the common knowledge gained through years of experience, I want you to examine that and state whether or not, in your opinion, that piece of paper could have escaped being burnt if it had been laying on the top of the sawdust in the attic at the time of the fire? [531]

Mr. Hermann: Objection. Again he is asking for an opinion which he is not especially qualified for.

The Court: You assume in your question, counsel, years of experience in burning, but you have no such testimony of Mr. Gillis. Again matters of common knowledge, common experience are questions of inference which may be drawn by the jury, but a witness may not testify to an opinion on a matter unless he is particularly qualified. Objection sustained.

(Testimony of Will M. Gillis.)

Mr. Taylor: If your Honor please, at this time I would offer this in evidence.

The Court: That has been admitted.

Mr. Hermann: Could I see that, Mr. Taylor.

(Mr. Hermann examines the soldering iron.)

The Court: No, I do not believe this soldering iron was admitted. It was merely marked.

Mr. Crane: The same in number, same make and manufacturer.

The Court: No objection?

Mr. Hermann: No objection.

The Court: Exhibit 14 then may be received.

(Defendant's Exhibit No. 14 is received in evidence.)

Q. (By Mr. Taylor): Now Mr. Gillis, I hand you plaintiff's Exhibit I and plaintiff's Exhibit E and ask you to state if those two exhibits if put together would [532] constitute a soldering iron?

A. I am not qualified to answer that, sir. They look very much like pieces of a soldering iron to me, but I am not an electrician and I couldn't answer you on that truthfully.

Q. And then this soldering iron that has been introduced in evidence here, do you know whether or not this barrel and this point is all the metal work there is in that?

A. I can't truthfully answer that either, because I haven't had one of them apart.

Q. Now Mr. Gillis, coming back to that bulkhead that you stated was about a short distance from where the fire started, would that bulkhead

(Testimony of Will M. Gillis.)

have a tendency of eliminating or cutting off any draft that would be going through the fire?

A. I would think it would have a tendency to.

Mr. Taylor: You may take the witness.

Cross Examination

Q. (By Mr. Hermann): Mr. Gillis, what state of repair did the building appear to be in when you examined it? Was it a good state of repair, poor state of repair or how would you express that?

A. For the age of the building I would say it was in a fair state of repair.

Q. Was it level? Did you test that?

A. That I couldn't tell. I didn't take an instrument to put on it or anything.

Q. Did you examine the wiring? [533]

A. Not particularly, no.

Q. Did you examine the roof?

A. I looked at the roof, yes.

Q. What kind of condition was it in?

A. Oh, I would say normal for the age of the building.

Q. You weren't able to get underneath the building?

A. I just looked at it from the outside.

Q. Well, then, when you made your estimate of value, did you assume whether or not it would need wiring? Did you take that into consideration?

A. Yes, sure.

Q. Did you, when you said \$1,000.00 to \$1,500.00

(Testimony of Will M. Gillis.)

for the damage by fire, did that include re-wiring of the building?

A. That would include the damage — the re-wiring that was burned. I don't know how much. A lot of wire you couldn't see. It wasn't exposed.

Q. It would be just from an assumption then?

A. I judged from what I could see that that would take care of the wiring that was damaged. That may be \$1,500.00 or again, it may be a little more or less. Whether the other wiring is in good enough shape now that you could safely hook on to it or use it, or whether the whole building would have to be re-wired——

Q. Assuming the whole building would have to be re-wired, would you be able to give a figure?

A. I would have to go back to an electrician or get him to give me an estimate.

Q. When you appraised the building you didn't consider any factor of re-wiring? [534]

A. I didn't appraise the building; I figured the replacement cost of the building.

Q. The replacement?

A. The replacement cost of the building. In other words, if I had to go up there and build a similar type of building, I figured it would cost approximately so much, which would include the wiring and so on and so forth.

Q. Well, then, other than the depreciation figure we have taken here, by using the figure of 5%, you have deducted nothing else from that replacement cost?

(Testimony of Will M. Gillis.)

A. No. No. In fact I didn't even deduct that because I didn't know the age of the building and didn't know the original cost of the building, and I am not positive whether 5% is an allowable cost to depreciate it.

Q. Did you make any estimate as to the present market value of the building?

A. No. I don't know about that at all. I don't know about the land values in Kotzebue. I wouldn't know about that at all.

Q. In other words, it would depend on factors that you are not familiar with?

A. What's that again?

Q. That would depend on things you are not familiar with?

A. That's right. I don't know property values in Kotzebue.

Q. Now these tests you have made, particularly the one where gas was used—you state they were all made in the open air?

A. Any burning was done in the open air with the exception of the first test. That was made with a presto-lite torch and that was done just inside the door. [535]

Q. After the first one?

A. Yes. That is, after the first smoking action we got outdoors.

Q. I see. Did you extinguish those blazes outdoors?

A. They went out by themselves.

Q. They would have full opportunity to burn up

(Testimony of Will M. Gillis.)

all the gasoline? A. That's right.

Q. They were not extinguished? A. No.

Q. You poured no water over them or anything?

A. No.

Q. Were any of them put in a confined space at all, such as a stove or oil drum or anything like that?

A. Two of the tests were conducted in a small tin can. I mean a low tin can; because I didn't want anything with gas in it to spread. The two with the iron were conducted in a pile.

Q. In a pile?

A. Yes—the one test with a soldering iron and the one with a presto-lite torch were conducted in a pile, but the gas and oil and blazo tests we took outdoors and put in a low can, poured the can full.

Q. Oh, the can was filled?

A. It was filled full of sawdust, yes.

Q. Would you describe that can.

A. A pound coffee can about so big (indicating).

Q. Were there any holes in it?

A. Well, the top was off. [536]

Q. No draft could come under that?

A. No, I don't think so.

Q. Now would you describe how this sawdust was piled in the tests that were not made in the can.

A. Those not in a can were just heaped up in a mound.

Q. Not on the outside?

A. What was done was done in front of the door, but it was done inside the building, but it

(Testimony of Will M. Gillis.)

made so much smoke in there we took the rest of them outside.

Q. Did you observe any glowing of the sawdust?

A. Yes, you could see a charring action there a good deal like punk, but there was no flame.

Q. You have no way of knowing what the effect of this would be if it were in a confined space?

A. I don't believe I understand.

Q. If the fire were covered, for instance, you have no method of knowing what the effect would be then? A. No.

Q. If it had a cover on it as in a stove or drum or something?

A. Well if it was in a drum with a cover on it I don't know whether you would get flames or what you would get there. You certainly wouldn't get any air to it. It would die out.

Q. Mr. Gillis, would you tell us whether or not—I am holding up defendant's Exhibit 14—this blackened portion on the handle, whether that was on the handle when you started your experiment or not? [537]

A. No. I didn't see anything like that on the handle at the experiment. I expect that probably comes from shoving it back into it, fairly deep into the charred sawdust.

Q. Did the fire do that?

A. Not that I remember, no. It might have been. I didn't take particular notice of that. I rather assume that we did it, but I couldn't swear to that.

Q. Now did you ever conduct any tests using

(Testimony of Will M. Gillis.)

only the element of the iron? A. No.

Q. You always used the whole iron?

A. That's right.

Q. Did you ever conduct any tests using any material other than sawdust?

A. Other materials?

Q. Yes. Such as paper and things like that.

A. No.

Q. You always just used sawdust? A. Yes.

Q. Never used paper or cardboard or rags or any other material? A. No.

Q. How long did the fire burn when it had been mixed with the gas and oil?

A. I can't tell you the exact minute on that.

Q. A guess is good enough.

A. Mr. Lewis will probably have it, but probably thirty minutes, I guess; it took maybe a little longer than the other two.

Q. Was the blazo about 20 minutes? [538]

A. Again, Mr. Lewis kept the exact time on them.

Q. How high a pile of sawdust was used with the blazo alone?

A. Probably four inches high.

Q. How far did the flames leap up?

A. Not very high. Maybe when we first lit it a little bit higher than after.

Q. Did they go with a poof?

A. Naturally. Any gas does when you put a match to it.

Q. There was some flaring up at first?

(Testimony of Will M. Gillis.)

A. As I say, it probably flared a little bit higher when it was first lit, when the first fumes went off.

Q. And it would go down when the gas was consumed? A. Yes it did; it went out.

Q. About how large an amount of that mass of sawdust was charred?

A. Very little. Right on top of the sawdust. Maybe it was charred down an inch.

Q. An inch over the surface?

A. Yes. The pile down below wasn't charred deep.

Q. By charred do you mean that it was burned and black like charcoal?

A. More or less, yes. It burned a good deal like punk, a piece of punk.

Q. Smouldering?

A. You wouldn't get a flame back out of it. How long the smouldering action would go on I don't know. It might smoulder the whole pile away or it might go out.

Q. While it was smouldering did it discharge much heat?

A. Some, yes. Naturally. [539]

Q. How long did the charring last in the case of the test conducted with sawdust and gasoline?

A. Oh, I couldn't say exactly. After the flame had gone out it probably would have charred for quite awhile very slowly. It probably would have charred for a long time but very slowly.

Q. It would char for a much greater length of time than blaze?

A. Than blaze? If you could keep the blaze go-

(Testimony of Will M. Gillis.)

ing it would burn up in a very short time, but it would char a long time.

Q. Would it char for a long time after the blazing went out?

A. Yes. It would char for a long time. It would depend on the air conditions and so forth. I don't know just how long.

Mr. Hermann: No further questions.

The Court: Do you have any further questions, Mr. Taylor?

Mr. Taylor: I have some further questions but I would rather take a recess at the present time, your Honor.

The Court: Very well. We will take the usual noon recess.

(Thereupon the jury was duly admonished and court recessed at 12:00, noon, until 2:00 p.m.)

After Recess

(At 2:00 p.m., all persons necessary being again present, court reconvened and the trial of this cause was resumed. Both counsel stipulated to the presence of the jury and Will M. Gillis resumed the stand for redirect examination.)

Redirect Examination

Q. (By Mr. Taylor): Mr. Gillis, I believe I overlooked asking you one question. And that is, what proportions of oil and gas did you use in making, I believe, test No. 3, where you had the oil and gas mixture?

(Testimony of Will M. Gillis.)

A. We used a pint to the gallon.

Q. Now I believe in response to a question propounded to you on cross examination by Mr. Hermann as to where and under what conditions you made these tests, could you state whether the combustion would be better in the open air or in a confined space?

A. I think it would be better in open air, of course.

Q. Is that by reason of more oxygen?

A. That's right.

Q. I believe that's all, Mr. Gillis.

Recross Examination

Q. (By Mr. Hermann): Mr. Gillis, in regard to the test where you used gasoline and sawdust, what did you ignite that with?

A. With a match.

Q. You didn't at any time use a soldering iron to ignite the gasoline and sawdust?

A. Not the gasoline and sawdust, not with a soldering iron.

Q. Why?

A. I think it would be a little bit dangerous. I think you would be more apt to get an explosion. I wouldn't want to try it myself.

Q. In none of those tests did you use a combination of sawdust, gasoline and a soldering iron?

A. No. [541]

Q. Was there any particular reason you used a pint to a gallon?

(Testimony of Will M. Gillis.)

A. It was a fuel we already had mixed for a chain saw. That is the proportion we used in a chain saw.

Q. You just used that, then? A. Yes.

(There were no further questions and the witness was excused from the stand.)

NORVIN LEWIS

is called as the next witness for the defense and after being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Taylor): Would you state your name please, for the record.

A. Norvin W. Lewis.

Q. Where do you reside, Mr. Lewis?

A. On Front Street here in Nome.

Q. What is your occupation?

A. At the present time I am bookkeeper for Gillis Construction Co.

Q. Have you, in the past, held official positions in the town of Nome? A. Yes, sir.

Q. What has that been?

A. I was for a number of years cashier in the Clerk's office, and also Clerk of the District Court for a number of years.

Q. How long have you been working for Mr. Gillis as a bookkeeper?

A. Well, it's about 14 months now. [542]

Q. Now Mr. Lewis, have you within the past few days been present while Mr. Gillis was making some tests in regard to the ignition of sawdust?

(Testimony of Norvin Lewis.)

A. Yes sir.

Q. Under various conditions? A. Yes sir.

Q. Will you just state what tests, to your knowledge, were made in your presence.

A. Well, there were five tests made. The first test was a heap of sawdust about four inches high in which a live flame was played or driven right on top.

Q. What was that live flame from?

A. From a presto-lite torch. The flame was from presto-lite gas. That flame played on there approximately five minutes, a hot flame. The second test we made, or rather the second test that Mr. Gillis made, was about the same amount of sawdust, taking an electric soldering iron and placing it about two inches under the top, and turning on the electricity. That continued for approximately 55 minutes.

Q. Then the third.

A. The third test was made—we made the first two indoors. The next three we made outdoors. The next test was made by placing a mound of sawdust on a piece of iron outdoors, pouring on it gasoline that had lubricating oil in it, such as we used in a chain saw, and that was ignited. That burned for quite awhile. There was no flame from the sawdust at all in that one. I would say that it continued about forty minutes.

Q. The next test? [543]

A. The next one was about the same amount of sawdust with pure white gas. That one burned for

(Testimony of Norvin Lewis.)

35 or 40 minutes and did not ignite. The fifth one was made with about the same amount of sawdust with blazo-octane gas. That one burned somewhere in the neighborhood of 40 minutes without igniting the sawdust.

Q. Now on the first test—I don't know whether I asked you this question or not—that was done with a blow torch, is that right, a torch?

A. Yes. It was.

Q. Would you state what happened to the sawdust upon which you had placed the direct flame?

A. Well, it just seemed to kind of turn black, but it wouldn't ignite.

Q. Then where Mr. Gillis had the soldering iron in the sawdust, what was the result of that? What happened to the sawdust?

A. The sawdust turned black from the iron, up to the top. I guess it was buried about two inches, and when I—or rather when he took the iron out there was a place four or five inches long where the iron had been laying, and the sawdust was all black up to the top. On each side there was sawdust not harmed at all.

Q. Then what was the result as to the sawdust in your third test, in which you ignited the oil and gas?

A. Well that burned, the oil and gas burned for quite awhile and just turned the sawdust black. Pretty near all of it turned black, because there was quite an amount of lubricating oil in there that took longer to burn out than just gas.

(Testimony of Norvin Lewis.)

Q. Then as to No. 4, where you used the lighter fluid, how long did that burn? [544]

A. That No. 4 test lasted approximately thirty minutes and when it finally went out, it was just the top layer of the sawdust showed—probably about three-quarters of an inch down it had turned black. The rest had the natural color in it.

Q. Was that a char or ash?

A. It was a char; it wasn't an ash.

Q. What was the result as to the sawdust when you used the straight blazo?

A. Just about the same as the No. 4. It burned the gas off and only charred down just a little bit.

Q. What would you say as to the time it burned with the blazo?

A. Well, I didn't take the time on it, but I think it would probably be around thirty minutes. He used quite a little blazo on it.

Q. Then as to the lighter fluid, how long did that pile of sawdust burn when you used just the lighter fluid?

A. Approximately the same time.

Q. What would you say as to the time the oil and gas mixture burned?

A. I would say it burned 40 to 45 minutes.

Q. But none of them would ignite the sawdust in flames?

A. No sir, there was no ignition of the sawdust at all.

Q. Now I will hand you defendant's Exhibit No. 14 and ask you to look at that and state, if

(Testimony of Norvin Lewis.)

you can, whether or not that is the blow torch used by Mr. Gillis—the soldering iron, I mean?

A. It looks like it. I know the one we had up there had a blue handle and I noticed it was extra long, worn just part way. This was extra long.

Q. Now, Mr. Lewis, in addition to the testing of the various piles of sawdust to ascertain whether or not they would ignite under various conditions, of which one was using a blow torch, another one was putting a soldering iron and another with oil and gas, did you make any tests as to the remaining odor or smell in that sawdust after the tests had been run on it?

A. There was only one and that was where the lubricating oil had been used with the gas. There was a smell of lubricating oil afterwards.

Q. Did you apply the test of smell on each one of those piles of sawdust that you had made, the sawdust only?

A. Where the oil was used or where the gas was used?

Q. Calling your attention to where the blazo was used, was there any odor or smell to the sawdust after using the blazo?

A. No, there was not, that I know of.

Cross Examination

Q. (By Mr. Hermann): Mr. Lewis, in relation to the first test, that's where you used a soldering iron, was it not?

(Testimony of Norvin Lewis.)

A. No. The first test was the live flame. The second was the soldering iron.

Q. Well, did the sawdust glow?

A. What do you mean?

Q. Did it turn red and glow? A. Both.

Q. Did the soldering iron glow?

A. It turned red. It was red when we pulled it out after 45 or 50 minutes. [546]

Q. Do you know whether or not it burned its handle? A. I don't know.

Q. Did the sawdust itself glow?

A. No, not that I remember.

Q. Did it smoke?

A. Yes. There was a little smoke came from it.

Q. Now in these other tests, in the ones performed outside, did the sawdust continue to smoke after the gas had burned off?

A. Yes, it did for awhile.

Q. And while the gas was burning was there a flame? A. Yes.

Q. About how high a flame?

A. Well, I wouldn't say, on account of the air, the draft. It would be up and down. Sometimes it would be just barely covering the top. Sometimes it would go up two or three inches.

Q. When would it go up the highest, when there was more wind or less wind?

A. Well, when there was kind of a draft it would kind of pick it up.

Q. It was a noticeable flame though, was it?

A. Yes.

(Testimony of Norvin Lewis.)

Q. Did you at any time use paper in these tests? A. No.

Q. No paper? A. No.

Q. Were there any other tests made at that time? [547]

A. No other tests that I know of.

Q. Those were the only ones?

A. These were the only ones.

Q. Now those tests in which the blazo and lighter fluid were used, was it spread in the open or put in a container?

A. It was in a container.

Q. Was there any draft through the container?

A. Holes in the container?

Q. Yes. In any way? A. No.

Q. When you say this sawdust charred, do you mean that it turned to charcoal?

A. I wouldn't say that. I just know that it charred and turned black.

Q. Did you try to crumble it or anything?

A. I did not.

Q. But it did smoke, did it? A. Yes.

Q. Would it smoke after the gas part burned off? A. Yes.

Q. How long did it continue to smoke after the gas burned off?

A. I don't know; I didn't pay much attention after the gas burned out. I know it was smoking afterward. How long it continued, I don't know.

Q. Was the sawdust you used saved? Did you

(Testimony of Norvin Lewis.)

save any of that? I mean the stuff that was actually used for the tests? A. No. [548]

Redirect Examination

Q. (By Mr. Taylor): I would like to ask just one more question, Your Honor. Perhaps it would be helpful to the jury. Mr. Lewis, I hand you plaintiff's Exhibit K and ask you to pour a little of that out on that paper and then state whether or not that resembles the sawdust after you had made your tests on it with Mr. Gillis?

A. This appears very damp with something. In the tests we made there was nothing like that at all, although it does have a resemblance to the sawdust, but not in the same condition.

Q. But yours was dry?

A. Yes. Otherwise I believe the appearance was the same.

Q. I believe that's all, Mr. Lewis.

(There were no further questions and the witness was excused from the stand.)

GEORGE LAMBERT

was then called and sworn as the next witness for the defense and thereafter testified as follows:

Direct Examination

Q. (By Mr. Taylor): What is your name, please? A. George Lambert.

Q. Where do you reside, Mr. Lambert?

A. Kotzebue.

(Testimony of George Lambert.)

Q. How long have you resided there?

A. Since '53. [549]

Q. What is your occupation?

A. Water delivery.

Q. Did you, at the request of Mr. Crane, this past week go to the Kotzebue Grill?

A. Yes, I did.

Q. What did you do at the Kotzebue Grill?

A. I went up in the attic and got some sawdust.

Q. I will hand you plaintiff's Exhibit G-7 and ask you to state if you recognize that?

A. Yes.

Q. Can you see on that photograph the place that you got the sawdust from?

A. Yes. Right over this way (indicating).

Q. Would you just hold that up and point it out to the jury, approximately.

(The witness does so.)

A. Approximately right here (indicating), down close to the eaves.

Q. Then after you got the sawdust, what did you do with it?

A. I put it in this box and took it over to the house and put it in a shopping bag and wrapped it up.

Q. I call your attention to this box, which has been marked so, with defendant's Exhibit number 12, and you say that's the box that you took to the plane.

(Testimony of George Lambert.)

A. Yes. I took the jam out of it and set the jam on some other cases and used this box.

Q. How much sawdust did you put in it at the time? [550] A. It was almost full.

Q. And after you got that box full of sawdust, what did you do with it?

A. I took it home, wrapped it up, put it in a shopping bag and tied it up and labeled it to Fred, and then my wife took it down to Wien.

Cross Examination

Q. (By Mr. Hermann): Mr. Lambert, when was it that you sent that down to Nome, what day?

A. I believe it was Friday when she took it down, either Thursday or Friday that she took it down to the Wien office.

Q. The shipping bill says the 24th; does that seem right? A. Yes.

Q. What day did you actually get that out of the attic?

A. The same day. I took it right over to the house the same day.

Q. You testified that it was taken right close to the eaves?

A. Not right under the eaves, but right close, because it was dry there.

Q. Was the rest of the attic dry?

A. Right over the hole it is wet, right around the hole there. You couldn't take any sawdust from around the hole.

Q. You didn't take any from around the hole?

A. No.

(Testimony of George Lambert.)

Q. Was that hole where the burning was the heaviest?

A. Right under where the roof was burned out.

Q. You didn't take any sawdust from there?

A. No.

Q. Did you take it from the surface or did you dig it out?

A. Right off the surface. [551]

Q. Did you take any from under the surface?

A. I don't know—maybe down a couple or three inches, a couple of inches or so. I scooped it up.

Q. How was the weather at Kotzebue the last month or so?

A. Fair. A little rain the last few days.

Q. Has it been above freezing the last month?

A. Mostly, yes.

(There were no further questions and the witness was excused from the stand.)

MYRTLE LAMBERT

called and sworn as the next witness for the defense, and thereafter testified as follows:

Direct Examination

Q. (By Mr. Taylor): Will you state your name, please. A. Myrtle Lambert.

Q. Where do you reside? A. Kotzebue.

Q. The gentleman that was just now on the witness stand, is that your husband?

A. Yes.

Q. Mrs. Lambert, calling your attention to some

(Testimony of Myrtle Lambert.)

time—calling your attention first to this exhibit, defendant's Exhibit No. 12, have you seen that box before? A. Yes.

Q. Where did you first see it? [552]

A. At the house when he brought it home.

Q. What was in it at that time?

A. Sawdust.

Q. After your husband brought it home, what was done with it?

A. He wrapped it up in a shopping bag, tied it up.

Q. Did he put an address on it? A. Yes.

Q. Who was it addressed to?

A. Fred Crane.

Q. Then what became of the box?

A. I took it down to Wien and sent it off.

Q. When you took that down to Wien, calling your attention to defendant's Exhibit 13, was that given to you by Wien? A. Yes.

Q. And the proper charges were prepaid on that were they, Myrtle? A. Yes.

(There were no further questions and the witness was excused from the stand.)

RONALD COONS

was then called and sworn as the next witness for the defense and thereafter testified as follows:

Direct Examination

Q. (By Mr. Taylor): Will you state your name, please. A. Ronald Coons.

Q. Where do you reside, Mr. Coons? [553]

(Testimony of Ronald Coons.)

A. Steadman Street.

Q. What is your occupation?

A. Well, I do a little of everything, income tax work, carpentry, painting.

Q. Are you trained in electronics also?

A. Yes sir.

Q. Meteorological work?

A. Meteorological work.

Q. You say you do and have done income tax work? A. That's right.

Q. Do you know what the approved depreciation is, approved by the Internal Revenue Office, on frame buildings? A. Usually 5%.

Q. Now Mr. Coons, assuming that a building's replacement value would be \$58,000.00, but it was 13 years old, and you took that rate of depreciation for a period of 13 years, what would be the depreciated value?

A. It would be \$29,774.00.

Q. Then in income tax work how are repairs figured in that?

A. Well, that's with the depreciation.

Q. What?

A. With the depreciation.

Q. That's figuring in the depreciation?

A. Yes, in an instance like this.

Q. Could you give an example for one year, say, just a figure as to a certain amount of repairs? How much depreciation?

A. Ordinarily you would take the 5%. [554]

(Testimony of Ronald Coons.)

Q. Then if there was some repairs any year, you took the 5%?

A. I think they would *except* it if it showed a great increase in value to the property.

Q. That would increase the value, is that correct?

A. You would have to show that.

Q. That would be a permanent improvement?

A. Yes. Not a repair.

Q. Just taking the depreciation then on that valuation? A. \$29,774.00.

Cross Examination

Q. (By Mr. Hermann): Mr. Coons, would that be the way you would depreciate a new building?

A. Yes, ordinarily. You generally start with the cost.

Q. All right. Suppose I bought an old building? A. The actual value.

Q. The actual value?

A. It wouldn't be the replacement cost or anything else.

Q. Just an accepted rule that for 20 years for something of that nature—well, if I bought a used building and paid a hypothetical figure of \$10,000.00, say, I would start depreciating it at 5%, is that right? A. Yes, yes.

Q. Well, it wouldn't be at the replacement cost for tax purposes, would it? A. No.

(There were no further questions and the witness was excused from the stand.) [555]

ARCHIE ADIRIM

was then recalled as the next witness for the defense and having been previously sworn, testified as follows:

Direct Examination

Q. (By Mr. Crane): You have already been sworn. I believe you stated that you are a deputy marshal stationed at Kotzebue?

A. That's right.

Q. Are you acquainted with a man in Kotzebue by the name of Floyd Land? A. Yes, I am.

Q. To what extent, if any, did he assist you in the investigation of this case, beyond taking pictures? A. That's all.

Q. That's all? A. Yes.

Q. Is he still, since you have come to court here, have you given him any instructions or left him in charge of any information up there, to the marshal's office, to your knowledge?

A. No sir.

Q. Have you, as the marshal, given Floyd Land permission to break into the premises known as the Kotzebue Grill, since this trial has been going on?

A. No sir, I haven't.

Q. Has it come to your knowledge as to whether or not he has?

A. No sir, I really don't know.

Q. If such an act was committed it was without any official sanction, as far as you know?

A. Yes sir. [556]

Mr. Hermann: I would like to move to strike

(Testimony of Archie Adirim.)

this testimony on the grounds it is incompetent, irrelevant and immaterial.

The Court: I cannot conceive of any relevancy. If you are trying to impeach Mr. Land, he is not a witness here.

Mr. Crane: I am not trying to impeach Mr. Land. This is something that came to my knowledge.

The Court: What has it got to do with the issues here?

Mr. Crane: I cannot make a statement before the jury why I asked these questions. It wouldn't be fair. I have no hesitancy in telling the Court why I have asked them, if Your Honor wishes to know.

The Court: The jury will please retire to the jury room.

(The jury then leaves the room and retires to the jury room.)

Mr. Crane: It has just come to my knowledge, Your Honor, since adjournment of the Court at noon, that this building has been broken into by Floyd Land. Floyd Land has been more or less active in the investigation of this affair, as I have been informed. Also I happen to know his likes and dislikes and his position in this case. I wanted to find out if that breaking in of the building had any official sanction or was any part of this investigation. I think I had a right to do that because the man has been used somewhat in the investigation, although the marshal says only for the purpose of

(Testimony of Archie Adirim.)

taking pictures, to what other extent I don't know. That's what I want to bring out about this man.

The Court: That's all in evidence.

Mr. Crane: And I have asked the witness if he had any further participation or assistance in this investigation, and the only way I could find out was to ask the marshal.

The Court: Yes. Still I haven't heard where any such evidence is admissible here or what purpose it could possibly have. As I say, if you want to impeach the pictures, to show that the pictures were not authentic because he broke into the building last week, I cannot see where that would be logical.

Mr. Crane: Very well, Your Honor.

The Court: That's the only thing you could suggest? We are not trying Floyd Land.

Mr. Crane: Well to be perfectly frank, to put my position clearly before the Court, I learned of this instance during the noon hour and I haven't had an opportunity to brief up on the admissibility or whether it is admissible or not.

The Court: It is just a pure matter of logic, counsel.

Mr. Crane: Very well, Your Honor, I accept the Court's ruling. I am not arguing with the Court.

The Court: Very well.

Mr. Crane: I might state before the jury comes in, Your Honor, and before the testimony closes in the case—it is probably proper for me to re-

(Testimony of Archie Adirim.)

mark to the Court now, while the jury is absent, that we have a subpoena for Jerry Amundsen which was returned unserved. He couldn't be located in Fairbanks; he couldn't be located in [558] Anchorage. The news came back that he had left Marshall for Anchorage, and after a search that he had left for a trip to the States, and whether he is back in the Territory or not we have been unable to learn. But we have learned since the trial of this case and, as I say, over the weekend, that there is another witness who might corroborate the testimony of what Mr. Amundsen would testify to. I put in a call for that witness Saturday night, in fact got the operator, but he couldn't locate him, and he was to call me back Sunday and he didn't call me back. But I have found out now that this witness is back in Kotzebue but I haven't been able to interview him or contact him on the phone. Now if this case does go over until Wednesday morning we would like to reserve the right to put a witness on out of order, if I could get him down.

The Court: Before you rest, you mean?

Mr. Crane: Yes.

The Court: We will keep that in mind.

Mr. Crane: In other words, if we rest our case, I would like to reserve the right to put him on out of order.

The Court: While the jury is out too, what about this Jack Jones testimony? Where have you connected that up?

(Testimony of Archie Adirim.)

Mr. Crane: I think it is sufficiently connected by elimination of the can of gasoline in this entire case. I think we showed by the experiment of Mr. Gillis using the same ratio of fuel, one pint to a gallon, that the only thing that could have set a fire was a combination of outboard motor fuel, which is all over the place. [559] There are well over 300 motors in Kotzebue; they burn that type of motor fuel. We have eliminated the gasoline; we have eliminated the blazo, and we have shown that it was that motor fuel, if there was any incendiary fire, and we also experimented with one pint to a gallon, the same thing Jones testified that they used up and down the beach.

The Court: Well, there is apparently an inference which can be drawn from that. Very well.

(The jury then returned to the jury box.)

The Court: The objection raised to the questions asked the witness Archie Adirim with reference to Floyd Land has been sustained because they are not relevant to the issues of this case.

(There were no further questions and the witness was excused from the stand.)

Mr. Crane: If Your Honor please, at this time the defense rests, subject to the right, if we can get a witness here, to call him out of turn, if it goes over until Wednesday.

The Court: Very well. Does the Government have any rebuttal?

EDWARD J. HARKABUS

is then called as the first witness for the plaintiff in rebuttal, and having been sworn previously, testified as follows:

Direct Examination

Q. (By Mr. Hermann): Mr. Harkabus, would you state whether or not you have performed any [560] incendiary tests since last time you testified? A. I have.

Q. Would you state the nature of these tests, please. Describe how they were set up and performed without yet giving any conclusions as to them.

A. Well, I took a soldering iron, which was a 50 watt, 110, 120 volt, and I placed it in a waste-paper basket with the tip intact on the soldering iron, and after six minutes it charred the paper sufficiently to ignite gasoline vapors, although I didn't put gasoline in it at that time for safety reasons. But I then took the tip off of it and used the heating element from the soldering iron. I conducted approximately thirty tests of this nature and in each case it ignited paper that I had utilized, various types of paper.

Q. Would you explain what types of paper?

A. Primarily, roller towel type paper, and kleenex, cellophane, newspaper and tablet paper, and in each instance the element ignited the paper.

Q. About how long would it take for the element to ignite it?

A. Anywhere from 2½ to 3 minutes.

(Testimony of Edward J. Harkabus.)

Q. Did you experience any failures at all, that is, any failures to ignite? A. I did not.

Q. Did you, at any time, use gasoline with these experiments? A. I did.

Q. On how many occasions?

A. Roughly, I would say approximately on ten tests.

Q. What type of paper?

A. I used the same type of paper that I had used with the element alone. [561]

Q. What were the results of those tests?

A. When I used toweling that had been previously saturated, it would take a little while for the heating element to dry out the gasoline to a sufficient temperature where it would ignite, but when it did ignite it would go off with a "whoof", as you understand gasoline does when it ignites.

Q. Did you perform any other tests other than those you have described?

A. I took the element and placed it down into a wastebasket and waited approximately three minutes and it ignited the paper that was in the basket.

Q. Mr. Harkabus, do you know Clara Salinas?

A. I have met her, yes.

Q. When did you meet her?

A. That would be December 30.

Q. Where at?

A. At her residence, at the apartment above the Rotman Store in Kotzebue.

Q. What was the purpose of your visit?

(Testimony of Edward J. Harkabus.)

A. To interview Mrs. Salinas, Mrs. Rotman.

Q. Concerning what?

A. I asked her the whereabouts of Mr. Salinas on Christmas Day, the day of the fire.

Q. What was her answer?

Mr. Taylor: Just a minute, Your Honor. We are going to object to a conversation with somebody out of the presence of the defendant. Proper foundation has not been laid.

The Court: The question is obviously asked by way of impeachment in contradiction of Mrs. Salinas testimony as a witness, and for that purpose may be allowed. [562]

A. Her answer was that Mr. Salinas had been around the hotel most of the day; however, it would have been possible for him to have gone from the hotel without her knowledge.

Q. No further questions.

Cross Examination

Q. (By Mr. Taylor): I take it from your testimony then, Mr. Harkabus, you did not conduct any tests with sawdust, either dry or sawdust that had been treated with gasoline or with blazo or with a mixture of lubricating oil and gas?

A. Let me answer this way, Mr. Taylor: that from my tests the ignition temperature of paper closely approximates the ignition temperatures of gasoline, sawdust and wood shavings. And inasmuch as I did not have sawdust available to me I did not conduct tests with it. However, based on

(Testimony of Edward J. Harkabus.)

my calculations, if I had conducted tests with those elements it would have ignited.

Q. You say it would have ignited?

A. Yes sir.

Q. That is your opinion, then, Mr. Harkabus. But you did not—my question is: you did not make any tests with sawdust then, with gasoline in it?

A. No sir, I had none available.

(There were no further questions and the witness was excused from the stand.)

ROBERT W. OLIVER

was then called as the next witness for the plaintiff in rebuttal, and having been sworn previously, testified as follows: [563]

Direct Examination

Q. (By Mr. Hermann): Mr. Oliver, are you acquainted with Clara Rotman Salinas?

A. Yes, I am.

Q. Will you state whether or not you conferred with her concerning this case?

A. Yes, I talked to her. I think it was about the evening of the 30th. Mr. Harkabus and I went over to the hotel there and talked to her, and then again we talked to her on the second of January in the evening, Deputy Marshal Adirim and myself.

Q. Well, as to the 30th, will you state what you conferred with her about on that occasion?

A. We talked to her about how they were noti-

(Testimony of Robert W. Oliver.)

fied of the fire. I asked her how she was notified of the fire, and we asked her if Mr. Salinas was there in the apartment?

Q. What was her answer as to Mr. Salinas being in the apartment?

A. As I recall, she said that he definitely was there from nine o'clock on. She said Jerry Amundsen was over there in the evening from about six o'clock to eight o'clock and that Harold Little was there, and that he left and she and Mr. Salinas were alone in the large front room of the apartment; and I recall she said she was sitting on the couch and in fact she said she was sitting on the couch she was sitting on at the time we talked to her, and that Mr. Salinas was sitting in the large chair by the window in the corner.

Q. Did she state whether or not Mr. Salinas was in the apartment all day?

Mr. Taylor: Just a minute, if your Honor please. We object to the question. Leading. [564]

The Court: Oh, I do not find it leading. He may answer. The question was whether or not she stated that Mr. Salinas was in the apartment all day. That does not suggest the answer.

A. She said he could have been out of the apartment.

Q. (By Mr. Hermann): Now, what was the other day that you interviewed her?

A. It was on the first or second of January, I think. As I recall it may have been on the first, in

(Testimony of Robert W. Oliver.)

the evening of the first of January. I don't recall exactly whether it was the first or second of January in the evening.

Q. Will you tell us what she said, if you recall what she said.

A. Yes. It was pretty much the same as before. My interest in interviewing her the second time was primarily to establish exactly who it was that notified them of the fire, and at that time she said Nannie Howarth notified them. And also I was interested in establishing at that time how Mr. Salinas was dressed when they were in the apartment, and further, whether or not he had been out during the evening. Again, I wanted to find out again from her.

Q. What was her answer?

A. Her answer was that he was not out in the evening.

Q. What, further, was said by Mrs. Salinas on that occasion?

A. She said Nannie Howarth was the one that came up and notified them. She said that it was possible that Mr. Salinas could have been out during the daytime, and she told us she was leaving herself within a day or so. I think the next day she was going to Anchorage.

Q. Did you interview her about any other subjects, other than Mr. Salinas' [565] whereabouts on the day of the fire and those other matters you testified to?

A. Well I did ask her whether or not there were

(Testimony of Robert W. Oliver.)

any business connections, if she had any financial interest in the Grill, and she said that she did not.

Mr. Taylor: I am going to object. That wouldn't be competent, relevant or material to the issues, as to whether or not she had a business interest in the Grill.

The Court: I think not. Also, it would not relate to her testimony that I can recall.

Mr. Hermann: I had not intended to bring that out particularly.

The Court: That remark may be stricken as not competent.

Q. (By Mr. Hermann): Was anything else discussed?

A. Well, I asked her if she knew where Mr. Salinas was at that time, and she said she did not know where he was.

Q. Will you state whether any mention was made concerning the inventory at the Kotzebue Grill?

A. No. It is my recollection that I asked her whether or not, if Mr. Salinas had anything there, or if he had any part of the building there at the Rotman business. I don't recall specifically discussing the inventory part.

Q. What did she say in relation to the first part there?

A. She said that he had no interest.

Mr. Taylor: I think that question is a little bit confusing. What is the "first part"?

(Testimony of Robert W. Oliver.)

Q. (By Mr. Hermann): What did she say in regard as to whether or not Mr. Salinas had [566] anything in the Rotman Store?

A. She said he had no financial interest in the store whatever, no interest in there. As I recall her words, "He has his business and I have mine. There is no connection."

Cross Examination

Q. (By Mr. Crane): Mr. Oliver, what you have testified to is all from your memory?

A. Yes, except refreshed somewhat by reading the notes of the deputy who was there at the time, and also from reading the notes of Mr. Harkabus.

Q. You didn't read any of your own notes?

A. No sir, I didn't make notes at the time.

Q. In other words, your testimony is just hearsay from somebody else's notes?

A. No sir, it's to the best of my recollection.

Q. Now, Mr. Oliver, you made an extensive investigation of this fire. Did you ascertain from the airlines, both Wien and Alaska Airlines, that are common carriers into Kotzebue, a list of the passengers arriving in Kotzebue from the 15th of December to the 25th of December?

A. No sir, I never did, and I don't recall ever having told the deputy to check into it.

Q. Never mind. Did you make any investigation of who was in town?

A. No, not unless we may have inquired some-

(Testimony of Robert W. Oliver.)

time if anybody else was around. We made no investigation of the airlines or passenger lists.

Q. Or any of the passengers that might have arrived during those dates? A. No sir.

(There were no further questions and the witness was excused from the stand.) [567]

Mr. Hermann: I wonder if we might take a recess now, your Honor?

The Court: Very well. We will take a recess until ten minutes after three.

(Thereupon, at approximately 3:00 p.m., the jury was duly admonished and court recessed.)

After Recess

(At 3:10 p.m., all persons necessary being again present, court reconvened and the trial of the cause was resumed. Both counsel stipulated as to the presence of the jury.)

The Court: Very well. We will proceed.

Mr. Taylor: Could I just interpose for a moment. The Clerk has been worrying about a book that I had marked for identification and I am going to relieve his worries about it by moving that it be withdrawn. It was marked as defendant's Exhibit 8 for identification.

The Court: After it was used I think we were to return it.

Mr. Taylor: We didn't even do that.

The Court: Yes, it may be returned.

(Defendant's Exhibit No. 8 for identification is returned to defense counsel.)

MARJORIE LINCOLN

is then called and sworn as the next witness for the plaintiff in rebuttal, and thereafter testified as follows: [568]

Direct Examination

Q. (By Mr. Hermann): Would you please tell the Court and jury your full name?

A. My name is Margie Lincoln.

Q. How old are you? A. 17.

Q. Where do you live, Margie?

A. Kotzebue.

Q. How long have you lived at Kotzebue?

A. Well, ever since I was born.

Q. Would you speak a little bit louder, please.

A. Yes.

Q. Do you recall the fire in the Kotzebue Grill last December? A. Yes.

Q. Do you know where you were at the time you heard about the fire? A. Yes.

Q. Where were you?

A. Well, I was at Pete Lee's.

Q. What happened after you heard about the fire? A. We started getting help.

Q. Where did you go? A. To Coffee Dan's.

Q. Would you speak up a little.

A. I went up to Coffee Dan's and Joe Brantley's house.

Q. Any place else?

A. After that I went to Steve's house. [569]

Q. Which house is that?

A. Rotman's Store.

Q. Whereabouts did you go in Rotman's Store?

(Testimony of Marjorie Lincoln.)

A. What?

Q. Whereabouts did you go in Rotman's?

A. Upstairs.

Q. Who did you see, if anyone, up there?

A. Clara Rotman.

Q. Where was she when you saw her?

A. She was in the back room.

Q. How was she dressed?

A. She was dressed in her nightclothes and bath-robe.

Q. About how long was that after you first heard about the fire that you saw Clara Rotman?

A. That was after 11:00.

Q. How long after you first heard of the fire?

A. About 10:15 or 10:30.

Q. You heard about the fire at 10:15 or 10:30?

A. Yes.

Q. Then how long after that was it that you got to Rotman's hotel? A. I don't know.

Q. Do you recall whether or not you saw any lights in the hotel?

A. Well, there was a light in the back room.

Q. What do you mean by the "back room"?

A. It's their living room. [570]

Q. In their living room? A. Yes.

Q. Was there a light any place else?

A. No.

Q. No further questions.

Cross Examination

Q. (By Mr. Crane): Margie, when you say you

(Testimony of Marjorie Lincoln.)

saw a light in the living room, you mean the front part of Clara's apartment facing the sound, do you? A. Well——

Q. Well, what do you mean by the living room?

A. In the back of her place there, where it's in the back. I can't——

Q. Well, you have been upstairs in Rotman's haven't you? A. Yes.

Q. These lights that you saw were in Clara's apartment, is that what you mean? A. Yes.

Q. That's where it was that you saw it; the back is that part facing Kotzebue Sound?

A. Yes.

Q. Margie, did you see Floyd Land at the fire that night? A. No.

Q. Did you see him prior to the fire that evening? A. I think I heard him around.

Q. What?

A. I think I heard him around there. [571]

Q. What was he doing?

A. Helping with the fire, I think.

Q. Did you see him around the building before the fire? A. No.

Q. Did you see him in front of the house before the fire? A. No, he wasn't around.

(There were no further questions and the witness was excused from the stand.)

REX BOWEN

was then called as the next witness for the plaintiff in rebuttal, and after being duly sworn testified as follows:

Direct Examination

Q. (By Mr. Hermann): Mr. Bowen, would you please tell the Court and jury your full name?

A. Rex Roy Bowen.

Q. What is your occupation?

A. I am manager of the N. G. Hansen Trading Co. at Kotzebue.

Q. What type of firm is that?

A. A general merchandise firm.

Q. You sell what type of items?

A. We sell food supplies, drug items, clothing, hardware, everything in that line.

Q. Do you know the defendant, Natividad Salinas? A. Yes.

Q. Would you speak just a little louder, please. Do you know the [572] defendant, Natividad Salinas? A. Yes.

Q. What was the last time you have seen him?

A. The first week of this month, along the 6th or 7th.

Q. Where did you see him?

A. At Kotzebue.

Q. Was there any particular purpose to your seeing him on that occasion? A. Yes.

Q. What was it?

A. He offered to sell me some meat in the cold storage plant.

Q. Where did you see him at?

(Testimony of Rex Bowen.)

A. He came into the store, our store.

Q. What did you do in respect to his offer to sell the meat?

A. Well, I was interested in it and went over and looked at it.

Q. Where was it?

A. In the Kotzebue Grill.

Q. Whereabouts in the Grill?

A. In the locker room, in the cold storage room.

Q. About how much meat was there, if you know?

A. I judged there were probably between 350 to 500 lbs. in there.

Q. How long did you stay back in the cold storage room?

A. Probably 20 minutes, in the cold storage room.

Q. What did you do then?

A. Then we came out into the kitchen part of it and talked a few minutes.

Q. What were you talking about there? [573]

A. We talked about the value of the building. He made me an offer to sell it.

Q. What was his offer?

A. Well, he offered to sell it for \$10,000.00.

Q. Will you state what that was to include, the price?

A. Well, that was to include the building and the fixtures in it.

Q. Did he at any time ask you to place a value on the building?

(Testimony of Rex Bowen.)

A. Yes. He started the conversation by asking me what I thought it was worth.

Q. What was your reply?

A. I told him I wasn't a judge of buildings and property in Kotzebue because I hadn't bought or sold any, but I would guess maybe \$15,000.00.

Q. Was his offer of \$10,000.00 made before or after you said \$15,000.00?

A. That was after.

Q. Now are you familiar with the Grill building itself? Have you been in there before the fire?

A. Yes.

Q. How many times have you been in it about?

A. Oh, maybe a couple of times a week.

Q. From being in it have you observed any of the machinery and equipment?

A. Well, I haven't been in the back part very often, but occasionally I have been in there and noticed what was there.

Q. Would you state whether or not the machinery and equipment appeared to be new or used?

A. Well the equipment is used but it seems to be in pretty good shape. [574]

Q. No further questions.

Cross Examination

Q. (By Mr. Crane): Mr. Bowen, this offer of Steve Salinas, you say was made to you a couple of weeks ago?

A. No longer than that. The day was the first Monday in April. That was the 7th.

(Testimony of Rex Bowen.)

Q. That would be on the 7th of April?

A. Yes.

Q. The fire occurred in December?

A. Yes.

Q. Did not, at the time Mr. Salinas made you this offer on the building, was it not after he knew he had to come down here for trial and wasn't it after his case was set for trial?

A. Yes, I would imagine so.

Q. In other words, it was a sacrifice sale of the place, wasn't it?

Mr. Hermann: If your Honor please, I object. That calls for an opinion of the witness.

The Court: Well, he may be asked whether anything was said as to a sacrifice offer. Otherwise it surely is a conclusion you are asking for.

Q. (By Mr. Crane): Now in relation to going over this equipment—he asked you about the equipment in the restaurant. I will ask you if you went in, going out of the restaurant, to the warehouse directly behind the restaurant, that is stored full of equipment. Did you notice in there the electric grills, electric [575] toasters, a lot of electric appliances that were practically new and unused?

A. No, Fred, I can't say that I did. There was equipment in the kitchen though.

Q. There was equipment in the kitchen?

A. Yes.

Q. That equipment was all serviceable equipment as far as you could see?

A. As far as I could see.

(Testimony of Rex Bowen.)

Q. Did you notice the meat saw, any of the electric equipment back there?

A. I noticed the meat saw.

Q. That was serviceable, was it not?

A. Without examining it I couldn't tell.

Q. Approximately what is the cost of one of those meat saws?

A. We bought one that came up on the boat in the summer and we paid around \$320.00.

Q. Electric appliances and electric fixtures are rather costly in Kotzebue, are they not, taking into consideration the freight rates and present prices of them? A. Well, yes, they are.

Q. And you put a value of \$15,000.00 yourself on the building after the fire? A. Yes.

Q. And the place has been idle, as you know, since Christmas? A. Yes. [576]

Mr. Crane: That's all.

(There were no further questions and the witness was excused from the stand.)

Mr. Hermann: We have no further rebuttal.

The Court: Do you have any sur-rebuttal, counsel?

Mr. Crane: No, Your Honor. If it's the present idea of the Court to hold court tomorrow—as I stated out of the presence of the jury regarding some witnesses, if this case—it is now 3:30; if this case could now go over until tomorrow, we would ask for adjournment at this time, reserving the right of putting one witness on if he can be located. We are still attempting to locate him, Your

Honor, making every effort possible. But we will not delay the trial beyond tomorrow morning.

The Court: I very much doubt the evidentiary value of the testimony from the witness you propose, from what you stated. However, it might possibly be material; it might conceivably be material.

Mr. Crane: I don't believe Your Honor understood what I intended to prove by this witness.

The Court: I think I did. But I would not deny you that opportunity if you believe it is material, of course. It does seem that we could not conclude this case today very readily, and allowing an hour to each side for argument. Even if the argument were short it would run us overtime and would be burdensome, I am sure, to the jury. When we planned our calendar I had taken the view that I [577] might adopt the oral opinion of the Attorney General, as to which I had been informed, and it was rumored, that so far as Territorial offices are concerned primary elections could be considered as general elections. Now I have no official notice of that. At that time we did not anticipate that we would be so far behind in our calendar as we now are. Upon reflection, I am inclined very much to doubt it. The statute provides first that holidays shall be non-judicial days upon which no court shall be held, except with certain exceptions not applicable here, such as to receive verdicts of juries and so on; and another section of the statute provides what are legal holidays and includes this language: "The days on which a gen-

eral election is held throughout the Territory of Alaska". Now as far as I can recall in my memory of over thirty years since I first came to Alaska, I have never heard of a primary election being considered a general election. It is certainly separately treated in the statutes. There is provision as to primaries. There is provision as to primary elections to the effect that all provisions of the laws of the United States and the Territory relating to qualifications of voters and notice and conduct of general elections, counting of ballots, and so on, shall govern the conduct of primary elections where applicable. So a clear distinction is made in the statute itself between a general election and a primary election. I am inclined to believe that the purpose of the Attorney General was purely to be able to give the Territorial officials a holiday, and unless counsel wish to raise that point, I do not feel I need [578] go along with an oral opinion, if it were true, with respect to non-judicial days. But if counsel wish to raise that point and there is question about it, I would not like to endanger the whole case, of course.

Mr. Taylor: Your Honor, I would gladly state that I agree with Your Honor's opinion in this. I likewise have practiced many years in the Territory of Alaska and this is the first time I have heard that raised. We have always considered a primary a nominating election and nothing else, and not a general election.

The Court: That has always been my recollection.

Mr. Taylor: You can rest assured, Your Honor that we would not raise the question, Your Honor, in any way whatever.

The Court: It would seem then if we should recess this case now it would give counsel ample time to prepare argument in the case, which would no doubt take some preparation after over five days of testimony, and also permit me a little further time to complete instructions.

Mr. Crane: If Your Honor please, I notice Your Honor mentioned that we could consume an hour to each side. I wonder if it could possibly be longer because we have two counts in this indictment, and we have a week's testimony, and I doubt if we could cover it.

The Court: Well, I am quite willing. We could have longer than an hour. I think probably we should place a limit on it which wouldn't inconvenience anyone, and then counsel may split it as they wish. Otherwise it would be rather difficult because both sides might [579] then claim favoritism. So how about an hour and a half—how about an hour on each count. That probably would be more like it. Two hours to a side, if you require that much.

Mr. Crane: I doubt if we will use that much.

The Court: Suppose we put that limit on it.

Mr. Hermann: Two hours to each side.

The Court: It won't be hard to split it counsel?

Mr. Hermann: Yes.

The Court: That will give us ample time tomorrow, then, to conclude the case without wearing

out the Court and jury. I would like counsel to remain just a few moments with respect to an oral instruction that was requested, or if you have any other requested instructions. Very well, then, we will recess this case until tomorrow morning.

(The Court then duly admonished the jury and excused the jury until ten o'clock the following morning.)

The Court: Now do either counsel have any requested instructions?

Mr. Taylor: I have two, Your Honor. Possibly the Court already has instructions that will certainly fit on these matters.

(Mr. Taylor thereupon submits two requested instructions to the Court.)

The Court: Requested Instruction No. 1, I am not familiar with the presumption that is covered here. There is only one case cited here and that is one which would not be available in [580] our library here. Could you tell me what text you got this from?

Mr. Taylor: No. 1?

The Court: Yes.

Mr. Taylor: I believe it was Ruling Case Law.

The Court: Ruling Case Law has been superseded, really, by American Jurisprudence, but I will look into that.

Mr. Taylor: It might be. This is just another way that a presumption—a man is presumed to be innocent until proven guilty beyond a reasonable doubt. I do have two more instructions that had not yet been typed up, but I would like to type

them up and submit them to the Court this afternoon, if I could.

The Court: Well, No. 2; we have this covered to a little different degree, *at* to extent at least, where a building is not inhabited as a dwelling for several months. I have prepared an instruction where a building is abandoned to such use, and it may be that failure to inhabit it as a dwelling for several months—

Mr. Taylor: Well that would raise a question.

The Court: It would be possible, again, that it would be applicable here were it not for the statute which requires no occupancy. These are all Delaware cases you cite here. However, I will look into it. I doubt, however, if that law is under our jurisdiction.

Mr. Crane: Maybe, Your Honor, we could save time. Mr. Taylor stated that he has some instructions that are not typed up. Maybe he could give them to Your Honor orally. It might save time for [581] the both of us.

Mr. Taylor: I have these notes, more or less in the nature of thoughts down on paper—if the Court would like to look at them. In fact it might show whether the Court has instructions on those particular points or not.

The Court: They would be sufficient.

Mr. Hermann: I have not seen them.

The Court: Well as to No. 3, I have that covered, as to one of the essential elements that must be proven. We will show this to you then, Mr. Hermann.

I have No. 4 covered also, only a little differently with respect to the two counts. One of them requires that a person arrange to have set or cause to be set wilfully and maliciously and so on. As to Count 2, that must be shown that it was wilful and with intent to defraud the insurer.

As to those two they are covered.

Now, Mr. Crane, or I guess it was you, Mr. Taylor, suggested to me Saturday, orally, that the jury are entitled to an instruction to the effect that if they do not find the defendant guilty under Count 1, they must also find him not guilty under Count 2. Now I am inclined to believe that position is correct because the essential element of a wilful burning is applicable to both counts.

Mr. Hermann: However, there is the element of a dwelling house that they take so much issue as to Count 2.

The Court: Well, I am including a lesser degree. [582]

Mr. Hermann: You are including a second degree? Well, in that case they could find him guilty—as long as they find him guilty of one degree they could find him guilty of the second count.

The Court: If he is not guilty of arson in either degree he could not very well be guilty of the second count.

Mr. Taylor: That's true of both degrees.

The Court: Well, in ruling the other day, on the ruling on the motion to dismiss, I felt it necessary to submit to the jury the lesser included offense of the lesser degree of arson, where an

issue is raised as to whether this property is a dwelling house.

Mr. Hermann: Then their second instruction would have to be changed a little, if given at all, as to arson——

The Court: Well, that's within reason.

Mr. Hermann: I do wish to object to that word "inhabit". We have a statute which says whether "occupied, unoccupied or vacant", and whether uninhabited is the same as unoccupied I cannot say. As to their first instruction, I have no objection except that it might be a little strong in the way it ends. I think instead of this "prosecution must overcome this presumption", that it should be something to the effect that the presumption that a fire is accidental remains until overcome by competent evidence. I think that would be more accurate.

The Court: Well, again, this is a re-hash or re-statement of the rule of reasonable doubt.

Mr. Hermann: They say fires are presumed to be accidental until [583] proven otherwise.

The Court: Doubtless your instruction No. 1, unless re-phrased, would be immaterial probably.

*** ** I would like to know if there is an instruction as to "wilfully" and "maliciously". Wilful, as I understand the definition, is voluntarily, and malicious is if it is wrongful, that is, with intent to set fire?

The Court: That is not precisely the meaning. Wilfully means intentionally and not accidental,

and maliciously is with intent, wrongful intent or motive. That is legal malice not actual malice.

Mr. Taylor: If Your Honor please, we will want to make a motion for judgment of acquittal on both counts. I think those should be made formally tomorrow morning.

The Court: Could you do that at this time?

Mr. Crane: A renewal of our other motion.

The Court: Just wait until we finish this instruction business.

Mr. Hermann: Then you would say it is sufficient to show malice as distinguished from—well, in effect that it is not accident?

The Court: Wilfullness must be distinguished from what is accidental or accident; malice includes the question of wilfullness but it means with a wrongful design or motive.

Mr. Hermann: I think that would be close enough anyway.

The Court: That is the accepted definition of malice.

Mr. Hermann: I have no further instructions. I wonder if the Court's instructions will be available tomorrow morning? [584]

The Court: Yes. I will have them ready, I think, at the time of argument, or a little sooner if you wish.

Mr. Hermann: We would appreciate it; I am sure both of us would.

Mr. Taylor: I would now, at this time, move that the Court enter a judgment of acquittal of the defendant of the charges contained in Count 1

and Count 2 of the indictment, on the grounds there is not sufficient evidence to go to the jury, as the Government has failed to prove any of the essential elements of the case. They have not shown in any manner whatsoever that Mr. Salinas had the opportunity or the intent to set the fire. The fact that they have shown a lien against the property—we have shown the lien was paid off very shortly after it was put on. We have shown by competent testimony that Mr. Salinas could not have set the fire because he was at the Rotman Hotel at the time when the fire was set. We have also shown, Your Honor, that at the time in which the prosecution witnesses stated that he was at the Rotman Hotel, that somebody had entered the Kotzebue Grill and the lights were lit upstairs. That was around seven o'clock. At ten minutes to seven there was no light up there. At ten minutes past seven a light was there, and another party saw lights up there at 7:15; and also that during the entire afternoon, you might say, the principal witness for the prosecution, Brantley, was up there three times. He was three times in the Kotzebue Grill. The second time was 4 o'clock in the afternoon. There was no indication that anybody had been up there. He [585] was two times in the attic, and there was no indication that anybody had been up there and had gone into the attic. And the evidence is that thereafter that Mr. Salinas had no opportunity to go up there and make any overt act, commit any overt act toward burning the place. And so we feel, Your Honor, that in view of the

total failure to connect Mr. Salinas with the commission of either one of these charges, especially the arson, and furthermore that the intent has been negative as to injure an insurer, that there has been no claim, Your Honor, for loss that occurred by this fire.

The Court: I have thought of that.

Mr. Taylor: Mr. Salinas has had that insured for a couple of years. He has paid his premiums and at the time of the fire he was paid up, and after he was notified—a notice was sent which he did not get until recently—he paid \$1,500.00 more to the insurance company. We feel, Your Honor, there is a total failure of proof of intent to defraud the insurer; that he has paid thousands and thousands of dollars into the insurance company, and even today, by reason of the small amount of damage, he has not filed his proof of loss. And we think those matters are sufficient, Your Honor, that it should not be allowed to go to the jury. I think also from the statement of the United States Attorney in his opening statement, that he used a torch, made a torch out of a soldering iron and put it in the sawdust and started the fire—now that is one thing, Your Honor, which they have failed to do. They have brought in here a piece of tubing which evidently was part of a soldering iron at one time, because [586] it is similar to this new soldering iron which is in evidence. But that tubing, not the point, Your Honor, was the only thing that was found in the attic. This little rig here, that is Exhibit E, now, this, Your Honor, was

downstairs, down on the top floor. It was not in the attic. I have not taken this apart. I think it is the province of the jury to take that apart, but I believe inside that handle, Your Honor, the jury will find a piece which would go with these here (indicating), but which has not been shown here as an essential part of the soldering iron. Now we have had a number of tests made as to what is the ignition, about the ignition of sawdust, and they were made under conditions a lot more favorable to the ignition of it, that were conditions in the attic. And I believe very reliable people, the contractor and Mr. Lewis, who assisted and who testified here, I think, in a very logical manner, and I think his testimony should go a long ways to show that if any attempt to burn was made with a soldering iron that it would have fallen far short of what it did.

Now in addition to these two parts, Your Honor that they say was made up to a torch, they have here a cord, a connecting cord, which one lady here testified was the cord to her steam iron. But Your Honor, they haven't shown one place where this could have been plugged in. There is no showing as to any way it could have been conducted to a live line, and Your Honor, we feel that under the circumstances, under the testimony, that the only thing that—that the Government has indulged in conjecture and conclusions and not facts. [587]

Now, also, in addition to that, your Honor, I would like to move that the second count in this indictment be dismissed upon the grounds that it

does not state facts sufficient to allow the case to go to the jury in that it only alleges the act was wilfully done and that it was set wilfully. Now under the case of *Murphy vs. the State of Oregon*, 290 P. 1096, the Supreme Court of Oregon held that the word "malicious" is a necessary ingredient in a charge of arson for the purpose of defrauding an insurer.

The Court: That is not what our statute says.

Mr. Taylor: As I recall our statute it says "wilfully", but a lawful act can be done wilfully. But they say it must be maliciously. Their Act is very similar, and in that case the Supreme Court said that the indictment did not charge the defendant with maliciously having burned a building, and held it was insufficient to charge arson. They also said that where the evidence is circumstantial that the defendant must be acquitted if the circumstances are as consistent with his innocence as his guilt. Now in this case, your Honor, there is not one scintilla of evidence to connect Mr. Salinas with arson. The testimony of all the witnesses is just as consistent with innocence as with guilt, and I think it is incumbent on this Court, your Honor, at this stage of the proceedings to dismiss Count 2 and direct a verdict of acquittal or a judgment of acquittal as to Count 1. I think if we put this to the jury it is going to require the jury to indulge in guesswork and conjecture and conclusions not based upon facts because there is no place in this [588] thing that you can connect the defendant with arson. He has not been shown to be in

the vicinity of the place; he has not been shown to have any ulterior motive of setting the place on fire. He had insurance. He had insurance paid for, but he has not tried to collect any insurance, and also, your Honor, there has been no proof of loss, so we think, your Honor, that such skimpy, scanty, you might say negligible, proof of this defendant having anything to do with the fire would not be proper to submit to a jury.

The Court: Well, sir, I still very much believe in the fundamental principle that a Court in trying an action with a jury may not usurp the function of the jury, and where there are issues of fact which are controverted that those issues must be submitted to the jury. It is true that courts have sometimes done that very thing, but they have been criticised for it. Mr. Melvin M. Belli in his recent book "Ready for the Plaintiff" in tort cases criticises actions of which he calls the 13th juror, and I believe that any trial judge should avoid that very thing. It is true we may grant a motion for judgment of acquittal if the court finds that there is not sufficient evidence to be submitted to the jury where there is no real issue of fact, either that the crime has been committed or that the defendant is connected with the commission of the crime. I see no different situation now in this motion that at the conclusion of the Government's case except that we have even more a situation of conflict in the evidence. The testimony of Mr. Harkabus upon his opinions as to the origin and cause of the fire [589] is in con-

flict with that of Mr. Gillis, Mr. McKenny, and there is an issue of fact for the jury to decide as to which opinions are founded on the best reasons. It is true that the defendant has established an alibi through his wife, but there is a conflict of evidence there too, because there was at least one witness, Mr. Goodwin, as I recall, who testified that he had seen Mr. Salinas between 3:00 and 5:00 at Little's on that same afternoon. So we cannot accept the alibi as uncontroverted. It is true that there is evidence which would tend to contradict the evidence of the plaintiff with respect to somebody being in the place at 7:00, but that again is an issue of fact for the jury.

It is true that the evidence is circumstantial, but the law recognizes circumstantial evidence as a competent method of proof, and it is the jury who must judge as to the weight of it and how convincing it is on either side.

With respect to the argument that such circumstances must be wholly inconsistent with innocence and wholly consistent with guilt, the Supreme Court in a very recent case of *Holland vs. the United States*, 348 U. S., I think clearly did away with that principle, which had previously been given to juries as an instruction, and said that although there is some authority for it to the contrary, the better rule is that circumstantial evidence is competent evidence and the rule of reasonable doubt applies. So that theory, although it had been expounded by many courts is now wholly set aside

by the Supreme Court of the United States, and that, of course, is conclusive. [590]

The fact that the defendant has not tried to collect insurance, which seems to be granted, that he has made no proof of loss as yet, is a circumstance, yes, but not a conclusive one. Many inferences could be drawn from that and it is up to the jury to draw the inference of whether it is proof or not proof.

As to the second count, it may be that under the old law of Oregon, the element of malice is an essential element of a crime of burning with intent to defraud an insurer, but it is not an essential element of the crime as defined by our statute. Our statute says a wilful burning with intent to defraud constitutes the offense charged. Malice is an element of arson but not of this lesser degree, lesser offense.

I am convinced, gentlemen, this is purely a question for the jury and one in which the Court may not usurp the function of the jury and grant a motion for judgment of acquittal.

Therefore, both motions, the motion as to both counts, must be denied.

Oh, I might add one thing on it. Counsel suggest that there has been no proof, as the District Attorney first announced, that the building was over-insured. Well, there is a conflict of evidence there too, which should go to the jury. But even that motive was not necessary to be shown on the arson charge.

Mr. Hermann: That's right. Merely evidence of intent. As a matter of fact, no motive need be shown on the arson charge.

The Court: It has been so held. Intent to defraud must, of [591] course, be shown on the second charge, but intent may be proven by circumstances, naturally. Yes, I am convinced this is purely a question for the jury as to both counts.

Mr. Hermann: As to the separate motion for dismissal of Count 2, your Honor, is the Court overruling that also?

The Court: Yes. I thought I had so indicated, that I deny the motions as to both counts.

Very well, we will recess this case and adjourn court then until 10:00 tomorrow morning, at 10:00 o'clock.

Did I make clear the ruling on these instructions. I think I said I would rule on them in the morning but I believe we can dispose of them now.

Defendant's requested Instruction No. 1 I think is substantially correct and will be given in substance.

No. 2, I fear does not comply with our statute and must therefore be refused. However, we will instruct the jury as to abandonment for use as a dwelling constituting no longer any such use as a dwelling. As I said before, the Legislature must have had some reason to make that change and I do not know what the reason is.

Mr. Hermann: I have the legislative enactment on it when they did, and they specifically added

that part "occupied, unoccupied or vacant", and the original bill didn't even have it.

Mr. Taylor: That statute wouldn't hold up because it has been the common law from time immemorial that a person had the right to burn his own property as long as he doesn't injure others.

The Court: That ancient principle has long since been done away with in arson statutes, by statute.

Mr. Taylor: But if there is any change of the common law which also interferes with a person's constitutional rights? Their right to do with their property as they see fit, as long as they do not harm somebody else? If a person wants to burn his house, he should have the right to do it.

The Court: That has long since been done away with, counsel. The matter of occupancy is the only real departure from our law as it existed here for a great many years.

Mr. Taylor: You mean he couldn't burn his own house, your Honor?

The Court: I say that under the ancient common law it was not a crime but that that principle has been departed from in all states.

Mr. Taylor: Only by statute. So then if a person had a lot and shack and he wanted to get it cleared and he burned it down, then Mr. Hermann would have him in for arson? Is that right?

The Court: Well, if it is a wrongful act, maliciously done. And I think to be a malicious act it must be wrongful; it must be with evil intent or evil motive. And there is your difference. I think

if I had a shack and permission from the fire marshal to burn it down, I could burn it down and not commit any crime, but that would not be a malicious act.

Mr. Taylor: Well, a person is liable to prosecution for [593] destroying his own house then?

The Court: That is true.

Mr. Taylor: I will assure the Court that I will see if I can't get that law changed if I go down to the Legislature. I think it is a little bit severe. It certainly is in controversy with the common law—"occupied or unoccupied".

The Court: Yes, it departs from the common law. Well, we did not make the law. We will adjourn then until tomorrow morning.

(Thereupon at 4:10 p.m. court adjourned for the day.)

Be It Remembered that at 10:00 a.m. April 29, 1958, court reconvened and the trial of this cause was resumed. The defendant and all other persons necessary were again present, and both counsel stipulated as to the presence of the jury. The Honorable Walter H. Hodge presided.

The Court: We will proceed then.

Mr. Crane: No further rebuttal.

Mr. Hermann: No sur-rebuttal.

Mr. Crane: The defense rests at this time.

The Court: We will proceed then with the argument of counsel.

(Both counsel stipulated that the argument need not be reported, and the reporter was then excused from the courtroom.) [594]

(At the conclusion of argument the alternate juror was dismissed and the Court then read his instructions to the jury, after which the jury was placed in charge of sworn bailiffs and retired to consider its verdict.)

Be It Remembered that at 9:30 a.m., April 30, 1958, Court reconvened, the defendant being present in court with his counsel, Mr. Taylor and Mr. Crane; the United States Attorney, Mr. Russell R. Hermann; the Honorable Walter H. Hodge presiding, the jury being present in the jury box.

(At this time the foreman of the jury informed the Court that the jury had not yet been able to agree on a verdict. The Court thereupon read additional instructions to the jury after which it again retired in charge of the sworn bailiffs for further deliberation.)

This will certify that I, Mary C. Diede, in my official capacity as Court Reporter, Second Judicial Division, District of Alaska, did report the oral proceedings in open court in cause No. 1642, United States vs. Natividad Salinas, on the dates of April 21, 22, 23, 24, 25, 27, 28, 29, and 30, 1958, at Nome, Alaska.

That I reported such proceedings in stenograph

machine shorthand and that the foregoing pages numbered 1 to 595 incl. contain a full, true and correct transcript of such proceedings, with the exception of certain argument of counsel as indicated therein, prepared by me from my original notes to the best of my knowledge and ability.

Dated at Nome, Alaska, this 29th day of August, 1958.

/s/ MARY C. DIEDE

[Endorsed]: No. 16231. United States Court of Appeals for the Ninth Circuit. *Natividad Salinas*, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Second Division.

Filed and Docketed: October 27, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16231

NATIVIDAD SALINAS, . Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

STATEMENT OF POINTS ON APPEAL

Pursuant to Rule 17 (6) of the Rules of the United States Court of Appeals for the Ninth Circuit, Appellant states the following points upon which he will rely upon appeal.

1. The Court erred in denying Defendant's motion for acquittal made at the conclusion of the prosecution's case.

2. That the verdict is contrary to the weight of the evidence.

3. The verdict is not supported by substantial evidence.

4. That the Court erred in refusing to compel prosecution to elect upon which count Defendant be prosecuted.

5. The Court erred in overruling Defendant's motion to dismiss Count II of the indictment upon the grounds that it failed to allege facts sufficient to constitute a crime.

6. The Court erred in overruling Defendant's motion for judgment of acquittal on both counts of the indictment made at the close of the prosecution's case; and, at the close of all the evidence.

7. On the grounds of newly discovered evidence which; (a) was discovered since the trial; (b) the testimony was material to establish an alibi for Defendant, but the witness could not be located prior to the trial, although subpoena had been issued and placed in the hands of the U. S. Marshal; (c) the testimony is not cumulative or impeaching; and, (d) is material to the issues involved; and, (e) it is of such a nature that, on a new trial, the newly discovered evidence would produce an acquittal.

8. That the verdict was a compromise verdict coerced by the Court's refusal to discharge the jury for thirty-one (31) hours after the jury had reported that they were deadlocked and could not agree.

9. Misconduct on the part of the bailiff in conversing with the jury and securing a dictionary for the jury without the consent of the Court and counsel. That the said dictionary contributed to the arrival at a verdict as the jury did arrive at its verdict approximately forty (40) minutes after securing the dictionary.

10. That the verdict is erroneous for the reason that the crime of arson in the second degree is not an included crime in arson in the first degree; and

for the further reason that when the jury found the Defendant not guilty of arson in the first degree and not guilty of arson with intent to defraud an insurer, they in effect found Defendant not guilty of included offenses, and also found that there was no malice, intent or motive involved.

11. The Court erred in instructing the jury it could bring in a verdict of guilty of arson in the second degree.

12. That the Court erred in not setting out in the instructions a definition of arson in the second degree.

13. The verdict is inconsistent in that there were two offenses growing out of the same set of facts, and one offense includes elements or acts necessary to the commission of the other offense, a verdict of acquittal of one is inconsistent with a verdict of guilty of the other.

Dated at Fairbanks, Alaska, this 21st day of October, 1958.

FRED D. CRANE,
WARREN A. TAYLOR,
WARREN WM. TAYLOR,
Attorneys for Appellant.

/s/ By WARREN A. TAYLOR,
Of Counsel.

[Endorsed]: Filed October 23, 1958. Paul P. O'Brien, Clerk.

